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A TREATISE
ON THE
LAW OF BAILMENTS,
INCLUDING
CARRIERS, INNKEEPERS, AND PLEDGE.

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"PERSONAL PROPERTY," ETC.

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NOTE TO SECOND EDITION.

IN preparing this edition the author has made due reference to the latest decisions, English and American, and has personally revised his book in every part. With new text, footnotes, and citations, more than a hundred pages have been added to the original treatise, and the work is now stretched to the utmost limit possible for a single volume. Especial effort has been made to present a full and lucid exposition of the law of Carriers, — a subject which has wonderfully expanded within the present century, and yet cannot be well studied except as the flower, so to speak, of our common law of Bailments.

As in his other treatises, the author now introduces section numbers and head-lines into his text. This method is not without disadvantages when one wishes to present the analysis and classification of his chapter to the reader's eye; but its merits are fully recognized, and the present writer has sought by adopting it to conform his text-books to the fashion of the day.

J. S.

September 1, 1887.

P R E F A C E.

A TEXT-BOOK on Bailments may be thought a fitting supplement to my work on Personal Property. When the second volume of that work appeared I was urged to prepare such a text-book by some whose judgment appeared worthy of great confidence; and earliest among these was my honored friend, JOHN WILLIAM WALLACE, Esq., of Philadelphia, who inherits, with scholarly tastes of a high order, a peculiar aptitude for studies in this department of jurisprudence, and from whose critical suggestions I have especially profited. But, thinking the profession well enough satisfied with the earlier works of Angell and Mr. Justice Story, I passed the subject from my thoughts; and this volume would not have been written had not the publishers of those works and my own informed me, many months later, that they intended issuing a new text-book on Bailments which should give particular prominence to the modern law of Carriers, and that I had the first opportunity of becoming its author. Upon this unexpected invitation I undertook in good faith a task whose results, after the lapse of two years, are now before the reader.

Without forcing comparisons, I may be permitted to remind my professional brethren that, while the primitive writer has the advantage of legal principles in their simplicity, one who presents the law in its mature state draws from far more copious sources, and may picture our jurisprudence more faithfully and as men of the day wish to see it, confused as many of its features may appear.

The aim of this treatise is to supply both students and practitioners with a fresh and exhaustive exposition of legal principles, whose influence far transcends the limits placed by our jurists fifty years ago; and, by treating the whole subject from a modern standpoint, and newly classified, to make it better understood, and give each special branch its due consideration. Nor have important doctrines been discussed without the effort to present something like an historical sketch of their development in England and America. One may be a useful torch-bearer if he does no more than light up new paths; and, so far as I am aware, there is no writer now living who has already laid before the public, or promised, a full treatise upon Bailments or any one of its subordinate topics.

JAMES SCHOULER.

BOSTON, Jan. 1, 1880.

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A TREATISE
ON
THE LAW OF BAILMENTS.

THE LAW OF BAILMENTS.

PART I.

BAILMENTS IN GENERAL.

§ 1. Nature of Bailment ; its special or temporary Character.

— Bailment, as a branch of our law, relates exclusively to personal property. As the word itself, which is of French origin, literally imports, a delivery, or the placing of something in another person's hands, plays a leading part in the transaction which is denominated "bailment." Nor can such delivery be by way of intentionally clothing the recipient with the full rights of ownership in the thing, with the right of property and those other elements of what we call a perfect title, since the transfer is only for some temporary purpose. That purpose may consist with a temporary enjoyment of the thing by the recipient, — where, for instance, I borrow or hire a wagon ; — or it may not, — as if my engagement should be to store, transport, or repair a wagon ; but in either case this temporary holder of the chattel has possession and the right of possession, without a full right of property, or with only, as it is said, a *special* property.

We have seen that in a gift or sale of personalty the ownership is transferred :¹ in the one case without consideration, in the other with consideration. In a bailment, however, whether with or without consideration, possession is found

¹ See 2 Schouler Pers. Prop., Parts V., VI.

severed from the ownership; and no full title vests in the holder of the thing.

§ 2. **Bailment defined.** — Among the numerous definitions, more or less comprehensive, of the word “bailment,” to be found in our books, this, perhaps, is the most fitting: A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery, and to be returned or delivered over when that special purpose is accomplished.¹

¹ Bouv. Dict. Bailment, citing Prof. Joel Parker. The authorities are not quite harmonious, either as to the definition of the term or the comprehensiveness of the subject. Mr. Justice Story says: “A bailment is a delivery of a thing in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust.” Story Bailm. § 2. In this the learned author closely follows Blackstone, to whose language, however, he takes exception, as making use of one or two ambiguous expressions. *Ib.*; 2 Black. Com. 395, 451. Sir William Jones, on the other hand, has defined bailment as a delivery of goods “on a condition,” or (as he elsewhere says), “in trust on a contract,” that they shall be eventually restored or redelivered. Jones Bailm. 1, 117. Chancellor Kent, with his customary elegance and precision, expresses this same idea of a contemplated redelivery or restoration, to narrow the definition: “Bailment is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be duly executed, and the goods restored by the bailee, as soon as the purpose of the bailment shall be answered.” 2 Kent Com. 558.

This difference of opinion between two contemporaneous American authors of pre-eminent merit provoked a controversy, which was carried on in the foot-notes of their respective works without apparently touching the vital point at issue. Judge Story was criticised for applying the term “bailment” to consignments made to a factor, and generally “to cases in which,” observes the Chancellor, “no return or delivery or redelivery to the owner or his agent is contemplated.” 2 Kent Com. 558 *n.* To this Judge Story replies with spirit, citing not only the expressions of Lord Holt in *Coggs v. Bernard* (2 Ld. Raym. 917, 918), and some of the early digests, but Sir William Jones himself (Jones Bailm. 98), in support of his position, that the consignment to a factor constituted a case of bailment; though to Kent’s more sweeping objection (which was strong, even omitting the illustration of the factor) he did not pointedly respond. Story Bailm. § 2 and *n.*

The term “restoration” or “redelivery” of a thing bailed seems to contemplate the delivering party, or his agent, as the final recipient of what was bailed. And while the loose expressions of Sir William Jones

This definition conforms closely to the term from which it is derived; for here as elsewhere our early ancestors laid great stress upon certain visible formalities attending a transfer. But the subject takes a wider scope; for it is obvious that one may be a bailee, in many instances, where no actual delivery takes place; as when an owner sells and then continues in possession for some temporary purpose, not to add cases of finding, seizure, or attachment. Some have held that a bailment may be said to exist whenever the possession of a chattel is lawfully severed from its ownership or from any right derived from and representing ownership.¹ This definition, however, is too broad to serve as the basis of a treatise like the present;² though unquestionably the bailment principle of responsibility is at the root of property management by executors, administrators, trustees, agents, and the like. Confining our subject within its proper limits, we shall essay a definition of our own, and it is this: That bailment consists in the holding of a chattel by some party, under an obligation

do not positively require this narrow sense, Chancellor Kent's careful definition hardly admits of a different one. And yet this must narrow the subject too far; for, dropping Judge Story's illustration, there is undeniably the case of a carrier or mandatary who commonly takes the chattel, charged with the duty of delivering it over to some specified third person, — perhaps to a new owner. Kent himself treats of such cases under the head of bailments, as he should have done. But to a certain extent his criticism of Judge Story's definition should be thought just; for to make "bailment" synonymous with any delivery of personal property on special trust would be leading into an unfenced field. Executors or administrators, and those who manage property with the right to invest and re-invest, are not in the strict sense bailees.

In Stephen's Commentaries (the modernized Blackstone for English students), "bailment" is defined, conformably to modern authorities, and with substantial accuracy, as "the delivery of goods for some purpose, upon a contract, express or implied, that, after the purpose has been fulfilled, they shall be redelivered to the bailor, or otherwise dealt with according to his directions, or (as the case may be) kept till he reclaims them." Steph. Com. bk. 2, pt. 2, c. 5, p. 80. But cf. ib. bk. 2, pt. 2, c. 1.

¹ See Holmes Com. Law, 165.

² See note 1, *supra*; Schoul. Exrs. & Adms., § 314.

to return or deliver it over after some special purpose is accomplished. For a contract is not here indispensable, provided one holds the property and the law casts upon the holder an obligation of this kind. To the first delivery, if there be one, succeeds a certain performance by the recipient which that delivery contemplated; and, this performance concluded, the thing is properly delivered again by the recipient, though whether to him who first delivered or to some third party must depend upon the particular circumstances of the transaction. This third party is not always personally specified at the outset, — as, for instance, where goods are bailed to a factor to sell, or to a warehouseman to deliver on order. The party first delivering the thing is the *bailor*; the recipient, upon whom rests the duty of a final return or delivery over, is the *bailee*.

In bailment law we seek to enforce rights and duties which grow out of a temporary relation towards specific personal property. There may exist our bailment relation, with or without a contract and the mutual understanding of parties; culpable injury to the thing, moreover, may or may not be viewed as a tort; but the rights and duties of this relation must be deduced from the circumstances, and neither the law of contracts nor the law of torts fully gauges the subject.

§ 3. **Who may be Bailors and Bailees; Constructive Bailees, etc.** — Such is bailment: a division of the law whose main artery ramifies into the closest transactions of our daily life. Trustees, agents, factors, warehousemen, commission merchants, — all have duties and responsibilities in the handling of personal property, founded in its doctrines. The custody and management of estates involve the bailment principle. One can hardly take another's chattel, short of buying it, receiving it as a gift, or otherwise procuring the full ownership thereto, without making himself to some extent and in a certain sense, a bailee. Where goods are sold and delivered under some such condition precedent as payment of the purchase-money,

the buyer does not acquire at once the property in the goods, but, instead, holds them until they are paid for as a bailee.¹ And, on the other hand, the seller of goods who, for any cause, keeps them in his actual custody, after the property has passed out of him to a buyer, becomes in effect the buyer's bailee, and is held responsible accordingly; as, for instance, where he undertakes to store them, subject to the buyer's order, or to send them to some particular address.² Moreover, the delivery of personal property may be under some contract which creates a bailment for the time being, although permitting the bailee, at his option, to turn the transaction afterwards into a sale; as where a horse is taken on trial.³ Where one receives chattels for a specified time, agreeing to pay for their use and to purchase when the time expires, the transaction begins as a bailment.⁴ Other close distinctions between sale and bailment might be suggested.

Indeed, one may render himself liable as a constructive bailee under some judicial seizure, or through compulsion, or because of having embezzled or intermeddled with another's chattels, — a clear principle of law, by virtue of which some text-writers have felt justified in treating of captors, revenue officers, prize-agents, court officials, and salvors as special or *quasi* bailees for hire.⁵ And while no one is to be pronounced

¹ 2 Schoul. Pers. Prop. § 276 *et seq.*; 2 Kent Com. 497; Benj. Sales, bk. 2, c. 3; Bishop v. Shillito, 2 B. & Ald. 329 n.; King v. Bates, 57 N. H. 446; Dunlap v. Gleason, 16 Mich. 158; Harrington v. King, 121 Mass. 269; La Borde v. Ingraham, 1 Nott & M. 419.

² See Kohler v. Hayes, 41 Cal. 455; 2 Schoul. Pers. Prop. § 400; Duncan v. Stone, 45 Vt. 118; Wadsworth v. Alcott, 6 N. Y. 64. A conditional sale on credit, which reserves no ownership in the seller pending payment, is no bailment. Bruns. Co. v. Hoover, 95 Penn. St. 508.

³ Nelson v. Brown, 44 Iowa, 455; Hunt v. Wyman, 100 Mass. 199; 7 Ill. App. 395; Weir Plow Co. v. Porter, 82 Mo. 23.

⁴ Dando v. Foulds, 105 Penn. St. 94.

⁵ Story Bailm. §§ 130, 613-624. See Leavy v. Kinsella, 39 Conn. 50; Hobson v. Woolfolk, 23 La. Ann. 384; Newhall v. Paige, 10 Gray, 366; Cross v. Brown, 41 N. H. 283; Witowski v. Brennan, 41 N. Y. Super. Ct. 284.

a responsible bailee through the thrusting of things upon him utterly without his knowledge and acceptance,—as if one should stealthily put his parcel into my team while I was looking away,—the simple fact of knowingly holding possession of property which belongs to another will oblige the possessor, no matter how he came by it, to apply a certain care and diligence, and stand to a certain bailment accountability. Plainly, then, one may become a bailee *pro tanto* without private agreement, but under the imposition of a sound public policy, which regards the security of property rights; by one's chance finding, through force of circumstance, in the course or without the course of official duty, as a thief or other wrongdoer, by actual or by constructive acceptance. And of all bailees in this sense, the wrongful possessor is in the law's eye the most strictly answerable,¹ for his responsibility is absolute.

§ 4. **The same Subject; Public Officers, etc.**—The State is not readily assumed to have undertaken towards the property of its citizens the duties of bailee; nor will the merely temporary possession of private goods incidental to enforcing its inspection and revenue laws warrant such an inference.² But a public officer may be held to account as bailee for articles coming into his possession, even though it was not his legal duty to receive them.³ Sheriffs, clerks of courts, and many other public functionaries incur various bailment obligations in the line of official duty.⁴

§ 5. **The same Subject; Creditor by way of Pledge.**—Any creditor, we may add, may take security for his debt, by way of pledge; and, when such security is in his own possession, while he is not its complete owner, his posture is essentially that of a bailee with reference thereto.⁵

¹ See *Phelps v. People*, 72 N. Y. 334; *Michigan Central R. v. Carrow*, 73 Ill. 348.

² *Moore v. State*, 47 Md. 467.

³ *Phelps v. People*, 72 N. Y. 334.

⁴ See *Witowski v. Brennan*, 41 N. Y. Super. Ct. 284; *Cross v. Brown*, 41 N. H. 283; *Mott v. Pettit*, 1 N. J. L. 298; *Story Bailm.* § 130.

⁵ See *Pledge*, *post*.

§ 6. **But Delivery back or over is intended; Mutuum no Bailment.** — But now observe the limitations imposed by the definition with which we set out. In every simple bailment, a final return or delivery over of the thing bailed is legally contemplated, — of the thing repaired, it may be, or otherwise modified in condition, as circumstances require, and yet of the thing with its identity unchanged. The chattel must here continue one and the same chattel, while the special purpose of the holding or delivery is being accomplished. Hence, if the terms of the undertaking contemplated returning money instead, or any equivalent, the transaction would constitute, not a bailment, but a sale. For, as to equivalents, we should here note, the civil and common jurisprudence are at variance: the Roman law specifying one class as *mutuum* where it rests, absolutely, or as a matter of option, upon the bailee to deliver again, not the specific thing furnished him, but another of the same nature; whereas the recognized doctrine of England and the United States is, that the instant the property in the identical thing so delivered passes completely over to the new possessor, a sale takes effect; or, in other words, the recipient's fixed obligation to render an equivalent is simply that of an owner having a further duty to perform.¹ The usual test of this distinction, so often perplexing, between our common-law bailment and sale, is the agreement of the parties, whether or no for a transfer, simultaneous with delivery, of the original owner's property in the thing.²

¹ Story Bailm. §§ 371, 415; 2 Schoul. Pers. Prop. §§ 38, 39; Chase v. Washburn, 1 Ohio St. 244; Lonergan v. Stewart, 55 Ill. 45; McKay v. Hamblin, 40 Miss. 472; Foster v. Pettibone, 7 N. Y. 433; Brown v. Hitchcock, 28 Vt. 452. Thus, where one receives a jeweller's sweepings for refining, having the option to return the refined product or to account for the value thereof, the option is held inconsistent with a bailment relation. Austin v. Seligman, 21 Blatch. 506. But cf. Weir Plow Co. v. Porter, 82 Mo. 23; Caldwell v. Hall, 60 Miss. 330.

² Dunham v. Lee, 24 Vt. 432; Kent v. Buck, 45 Vt. 18; Furlow v. Gillian, 19 Tex. 250; Henry v. Patterson, 57 Penn. St. 346; Prichett v. Cook, 62 Penn. St. 193; 7 N. E. (Ind.) 311; Powder Co. v. Burkhardt, 97 U. S. 110.

But a bailment may be made on the mutual understanding that the subsequent performance of a certain act by the bailee or his exercise of an option hereafter shall at once vest full title in him, and turn the transaction into a sale, the title remaining meanwhile in the seller.¹

§ 7. **Bailment and Sale further distinguished.**— The borrower or hirer of money at our law comes within reach of this general principle. Binding himself to return, not the identical money received, but any money to that amount, he makes himself, not a bailee, but the purchaser, so to speak, of that money, to do with it as he will; or, we may better say, the debtor of the party from whom he received it. As a borrower, he has a like amount to pay back; as hirer, the amount with interest. And yet one might buy a flock of sheep, shares of stock, or any other kind of chattel, with corresponding variations of contract, obliging himself to return, not money recompense, but equivalent things of the same sort.²

¹ *Supra*, § 3; *Nelson v. Brown*, 44 Iowa, 455; 10 Daly, 214; *Caldwell v. Hall*, *supra*.

² See *Bellows v. Denison*, 9 N. H. 293; *Putnam v. Wyley*, 8 Johns. 432; *McKenney v. Haines*, 63 Me. 74; *Fosdick v. Greene*, 27 Ohio St. 484.

Certain kinds of incorporeal chattels, like stocks or bonds, which have a fluctuating market value, must in this respect occasion perplexity over the *mutuum* transaction; for the return of an equal number of bonds or shares of a certain kind may be by no means the return of an equivalent in value. But as such transactions have usually the color of speculation, the parties are assumed to have risked the consequences. *McKenney v. Haines*, 63 Me. 74; *Fosdick v. Greene*, 27 Ohio St. 484. In this last case, where the facts were quite unique, the court went so far as to uphold such a return of stock, notwithstanding the corporation originally issuing had ceased to exist, its old stock had been wiped out, and all its rights and franchises had been transferred to a new company.

Gaius gives a succinct exposition of the Roman *mutuum*. "This chiefly relates," he says, "to things which are estimated by weight, number, or measure, such as money, wine, oil, corn, bronze, silver, gold. We transfer our property in these, on condition that the receiver shall transfer back to us at a future time, not the same things, but other things of the same nature; wherefore this contract is called *mutuum*, because thereby *meum* becomes *tuum*." *Poste Gaius*, III., § 90.

§ 8. **The same Subject; Grain Elevators.**—An apparent exception to our doctrine of *mutuum* is sometimes stated in the case of grain stored in an elevator or warehouse, and mixed with the grain of the party who takes it in store. And several late cases hold that where one receives a customer's grain and stores it in a common bin with a like quality of his own, and if need be, of other depositors besides, his agreement being to return grain of a like quality on demand, the transaction is a bailment and not a sale.¹ The effort here and in all cases of confusion of goods is to do justice between the parties to a convenient business custom, and uphold their rational intention. To hold the owners of such an admixture owners in common of the mass, contributors and receiver included, would seem a fair conclusion; supposing the receiver not to have mixed wrongfully, nor to have so confused grain of different qualities that the mass cannot be divided again.² But, at all events, to pass the whole dominion and title over to the receiver as though the case were one of *mutuum*, or sale, would often violate the intent of such transactions, and tend to break up a useful business; for this would result on the one hand in exposing the total mass to seizure by the receiver's creditors, and on the other in making him solely liable for its destruction by accidental fire.

This question is one of great difficulty, and the law of accession and confusion must solve the scope of all such con-

¹ *Rice v. Nixon*, 97 Ind. 97; *Sexton v. Graham*, 53 Iowa, 181; *Ledyard v. Hibbard*, 48 Mich. 421. The rule is thus stated even though the warehouseman continually adds grain on his own account to the common mass and ships away therefrom; his obligation being, however, to keep constantly enough on hand to respond to all demands. Local statute sometimes affects the interpretation of such transactions. See *Greenleaf v. Dows*, 3 McCr. 27.

² 2 Schoul. Pers. Prop. § 46; *Inglebright v. Hammond*, 19 Ohio, 337; *Slaughter v. Green*, 1 Rand. 3.

In some of these grain cases the party owning the elevator is treated as a purchaser. *Lonergan v. Stewart*, 55 Ill. 44; *Chase v. Washburn*, 1 Ohio St. 286.

tracts.¹ We need hardly add that where one simply takes the goods of others to restore them in the same or a different shape, he is a mere bailee, and incurs no liability except through some violation of his bailment duty.²

§ 9. **Bailment relates to Personal Property; whether a Branch of Contract Law.**—Inasmuch as bailment pushes out its feelers *in rem*, there is much reason for pronouncing this subject a branch of personal property law. That it solely concerns personal property in a strict sense is not denied; nor that, by a transfer of the muniments of title, incorporeal things personal may be bailed, as well as those corporeal.³ Gifts and sales are doubtless, in a technical sense, confined likewise to personal property alone.⁴ And upon the knowing possession of another's chattel, rather than upon the mutual assent of parties, the law appears to operate. Yet our jurisprudence, it must be confessed, overfond of making contracts the complement of real estate, is wont to treat bailment as a branch of contracts; whence the confusing definition sometimes found, that bailment delivery is "upon a contract express or implied."⁵ Mutual assent, however, is at the foundation of most of the practical bailments we shall have to deal with. Nor need we, as some writers of excellent repute have done, argue the inappropriateness of the term "contract," on the ground that bailments without recompense lack a contract consideration;⁶ for it is at this day well settled that all bailments, with or without consideration, are as contracts upon sufficient legal consideration; that a benefit, though contingent and indirect, may serve as recompense; and, moreover,

¹ See 2 Schoul. Pers. Prop. 2d ed. §§ 44-53.

² *Ib.*; Chase *v.* Washburn, 1 Ohio St. 244; Young *v.* Miles, 23 Wis. 643.

³ See, *e.g.*, Story Bailm. 9th ed. § 290, and *n.*; Pledge, *post*.

⁴ 2 Schoul. Pers. Prop. §§ 54, 200.

⁵ Jones Bailm. 117; Story Bailm. § 2; 2 Bl. Com. 451; 2 Kent Com. 558.

⁶ See an interesting article by Mr. John B. Wallace, of Philadelphia, in 16 Am. Jur. 254-283. And see Judge Story's comments in Story Bailm. § 2 *n.*

that it is enough to support a promise that the bailor has yielded up possession of his own, and suffered disadvantage on the faith of his bailee's engagement.¹ Nevertheless, that bailment is not necessarily founded in a strict contract relation, we have already shown.

§ 10. **History of Bailment Jurisprudence; *Coggs v. Bernard*, etc.** — Bailment, a word brought over by the Norman invaders of England, appears to have served its first turn as a term of pleading tantamount to "delivery."² Its elevation to the title-word of an important subject can hardly have antedated the eighteenth century, though some meagre statements compiled from the Year-Books are to be found under this heading in Brooke and Rolle;³ while Sir Edward Coke, in his First Institutes, published in 1628, takes occasion, while discussing socage, to state a few points, and these not quite accurately, as to the bailee's liability.⁴ Lord Holt, in the celebrated case of *Coggs v. Bernard*, which was decided at Westminster Hall, during the second year of Queen Anne (1703), expounded for the first time, with an attempt at method, the English law of Bailments, and this with an energy of expression which has left an abiding influence.⁵ Yet the only point therein adjudicated was, that one who specially undertakes to carry safely and securely, though it be without hope of reward, must respond for the damage done through non-fulfilment of the special undertaking; or, more generally, that a gratuitous bailee is responsible for gross negligence. And, taking this opportunity to lay the first course of an English jurisprudence of bailments, his lordship found later materials so scarce

¹ Story Bailm. § 2 *n.* and cases cited; *Clark v. Gaylord*, 24 Conn. 484; *McCauley v. Davidson*, 10 Minn. 418; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Mariner v. Smith*, 5 Heisk. 203; *Newhall v. Paige*, 10 Gray, 368.

² 2 Reeves Hist. Eng. Law, ed. 1814, p. 333; 6 Am. Law Rev. 42.

³ See Bro. Abr. (A. D. 1576); Rolle Abr. (A. D. 1668), tit. "Bailement."

⁴ Coke First Inst. 89 *a*, 89 *b*.

⁵ *Coggs v. Bernard*, 2 Ld. Raym. 909; 1 Smith Lead. Cas. 283.

that he had to draw heavily upon that *bric-à-brac* importer of imperial remains, the ancient Bracton; and he felt so little satisfied with his own Latin classification as to express a doubt whether he had settled or unsettled the law in point.¹

§ 11. **The same Subject; Sir William Jones; Judge Story.**—Some three-quarters of a century later appeared Sir William Jones's famous Essay on Bailments:² the work of a travelling scholar, whose philanthropic zeal, purity of character, and wondrous erudition insured him an applauding public. Laymen are not discriminating critics of a purely professional work; and even with English practitioners it availed much that a dry subject was here expounded by a fellow-countryman in a flowing, picturesque style, and graced with learned allusions to strange codes which he, and not they, had studied. This Essay was put forth at a time when court precedents were still few; and the linguist of twenty-eight languages may be said to have planned for Lord Holt's foundation a striking building, somewhat of the Byzantine pattern. Not strangely, however, the influence upon our coarse-grained jurisprudence of one who made Oriental literature his life-work, dipping into the common law only by way of diversion, waned rapidly after his stimulating personality was lost. Later and sounder jurists, praising his elegance of style, have come to criticise many of his statements as loose, and sometimes contradictory;³ yet the little book, which was the first and only fruit of a projected series of tracts on comparative jurisprudence, served, in this respect at least, a consistent and truly useful purpose.

¹ "I have said thus much in this case because it is of great consequence that the law should be settled in this point; but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle." Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909, 920 (A. D. 1703).

² *Jones Bailm.* (1781).

³ See, *e. g.*, Kent, in *Thorne v. Deas*, 4 Johns. 100, and 2 Kent Com. 566, 574; *Story Bailm.* Preface. But cf. Parker, C. J., in *Foster v. Essex Bank*, 17 Mass. 499.

To Sir William Jones succeeded a far more trustworthy guide for English and American law-students,—Mr. Justice Story,—whose comprehensive and scholarly, yet practical treatise on Bailments received the freshest labors of a man who stood, while a youth, among the foremost in this country, both to teach and apply the doctrines of jurisprudence. Nearly half a century has elapsed since the volume, then of modest size, made its appearance; it is still cited abroad with respect; and no text-book in the language has supplanted or even crowded it.

§ 12. **The same Subject; Final Comments.**—Time makes rapid rubbish, however, of all law-books; and of the most useful which aim, in this day, to teach, the best, perhaps, to be said is, that they index well the learning down to date, and give an impulse to better methods. The influence of these three great men in succession, Lord Holt, Sir William Jones, and Story, upon one department of law, is quite remarkable, and must be largely accounted for by the slow accumulation of precedents while they lived. So rapidly has bailment law grown and expanded since the last of these flourished, that no fourth man can hope to keep any such mortmain on posterity. Variety, not to say confusion, attends our latest decisions. Two social contrivances alone, both of modern date, largely work out such a result: one, the delivery, more especially as collateral security, of incorporeal kinds of personalty; the other, the appliance of steam to transportation. The bailment luminaries of other days are vanishing light-houses; nor can any book hereafter keep up with the courts on such topics as Pledge, Innkeepers, and Common Carriers, unless re-written once, at least, in twenty years.

In one respect, all three of these teachers were at fault; they based their common-law exposition too much upon the Roman system, or, rather, upon such fragments as had washed ashore from the wreck. Lord Holt set the example of a nomenclature and classification which Sir William Jones could not but delight in; and their example Story followed, impressed by

authority, but not without a mental perception of something better. But the exotic all aided to transplant and keep alive, never could flourish in Saxon soil. The two later jurists, too, — admirers, and in a measure paraphrasts of Pothier, — joined him in perpetuating those logical wrestlings of Caius and Titius which European jurisprudence had come to possess as residuary legatee of the Pandects. How could such a plan of treatment serve well our law, when borrowed from an imperial code which draws the faintest line between things real and personal, knows nothing of the feudal land system, and never made a clear grouping under the theory of bailment at all?¹

§ 13. **Bailment Classification as formerly made.** — Bailment classification has usually followed, then, the divisions set forth by Lord Holt, and modified by Sir William Jones;² Blackstone, in his common-sense Commentaries, touching the subject too lightly to create an impression.³ These divisions, together with their Roman titles and definitions, may thus be stated: I. **DEPOSITUM**, a Deposit, which is a naked bailment of personal property to be kept for the bailor without recompense, and to be delivered again according to the special purpose of the bailment. II. **MANDATUM**, a Mandate, or the bailment of personal property as to which the bailee undertakes without recompense to do something. III. **COMMODATUM**, a Loan for Use, or the bailment of personal property to be borrowed or used by the bailee for a time without reward; but in our law, of course, to be restored *in specie*. IV. **PIGNUS**, a Pledge or Pawn, or the bailment of personal property to a creditor as security for some debt or engagement. V. **LOCATIO-CONDUCTIO**, a Hiring, which is always for some reward. This last bailment, according to Story, admits of four subdivisions: (1) *Locatio rei*, or the hiring of a thing for use; (2) *Locatio*

¹ See *passim*, Hadley's Introduction to Roman Law, lec. IX.

² Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909; Jones Bailm. 35; Story Bailm. § 8; 2 Kent Com. 558.

³ 2 Bl. Com. 451.

operis faciendi, or the hiring of work and labor upon a thing; (3) *Locatio custodiæ*, or the hiring of care and services to be performed or bestowed on the thing delivered; (4) *Locatio operis mercium vehendarum*, or the hiring of the carriage of goods from one place to another.¹

§ 14. **Bailment Classification preferable according to Recompense.** — Now the mutual rights and liabilities of bailor and bailee, at our law, turn essentially, we shall find, upon the contemplation of recompense or no recompense. The fundamental idea of our whole subject is that one whose pains are to go wholly unrewarded ought to be the most lightly bound; a maxim which, however distasteful to the strict moralist, is thoroughly consonant with the teachings of the common law. And since no nice gradation by the amount of recompense is here attempted, bailments at common law may well be grouped under these three heads, as Judge Story himself has admitted:² (1) Those for the sole benefit of the party on the bailor's side; (2) Those for the sole benefit of the party on the bailee's side; (3) Those for the benefit of both parties. In the first two instances, the benefit designed is unilateral; in the third, bi-lateral or reciprocal. And we are to bear in mind that it is not the actual issue of the undertaking, but its intent, by which recompense is to be tested. Under such a classification the foregoing titles fall readily into place; and the parade of Roman names imposes less readily upon the reader who reflects that there is much the same variety of transactions capable of performance, whether one is to get his

¹ Story Bailm. §§ 4-8; Jones Bailm. 36, 117. Sir William Jones makes but three divisions of *Locatio*, defining *locatio operis faciendi* as the performance or bestowal of work and labor, or care and pains, upon the thing delivered. But Story limits the sense of this *locatio* as in the text, and makes four subdivisions, so as to set *locatio custodiæ* apart.

Mr. Stephen has well observed that this Roman division does not entirely accommodate itself to the practical distinctions of our business life. Steph. Com. bk. 2, pt. 2, c. 5, p. 81, n.

² Story Bailm. § 3.

reward or serve gratuitously. Once more, however, exceptional rules and an exceptional responsibility confront us, when we come to regard Innkeepers and Common Carriers: not that they are more or less than bailees, as to the method of performance, but because public policy sees fit to clothe those who regularly pursue these vocations with a bailment responsibility for personal property confided to them, unusually great, and in fact approximating insurance. These, with Postmasters, our public messengers, who also have a peculiar measure of responsibility, are conveniently treated under this additional head: (4) Exceptional Bailments. Our complete chart of bailments stands, then, like this:—

	Including among the special purposes of such bailments more particularly:—	Or, under the old method of classification:—
I. BAILMENTS FOR THE BAILOR'S SOLE BENEFIT.	(a) The gratuitous taking of a thing on deposit; (b) the gratuitous performance of work upon a thing; (c) the gratuitous carriage of a thing from place to place.	(a) <i>Depositum</i> . (b, c) <i>Mandatum</i> .
II. BAILMENTS FOR THE BAILEE'S SOLE BENEFIT.	(d) The lending of a thing; <i>i. e.</i> , practically for its temporary enjoyment by the borrower.	(d) <i>Commodatum</i> .
III. ORDINARY BAILMENTS FOR MUTUAL BENEFIT.	(a) The taking of a thing on deposit for reward; (b) the performance of work upon a thing for reward; (c) the carriage of a thing from place to place on reward; (d) the hiring of a thing, <i>i. e.</i> , for temporary enjoyment; also, (e) the pledge or pawn of a thing.	(a) <i>Locatio custodiæ</i> . (b) <i>Locatio operis faciendi</i> . (c) <i>Locatio operis mercium rehendarum</i> . (d) <i>Locatio rei</i> . (e) <i>Pignus</i> .
IV. EXCEPTIONAL BAILMENTS.	(a) POSTMASTERS. (b) INNKEEPERS. (c) COMMON CARRIERS.	(a, c) A branch of <i>Locatio operis mercium rehendarum</i> . (b) A branch of <i>Locatio custodiæ</i> .

In all of the classes here enumerated, the bailment is seen to arise *in re*; and so as to involve delivery of a chattel for the accomplishment of some purpose towards it, to be followed by its final delivery back or over, when that purpose has been accomplished. Thus, the "hiring" spoken of extends not to the hire of general work and service, but only to the hire for use, or the hire of service to be bestowed upon the specific thing. Our *depositum*, again, is not such a deposit as one makes over a bank counter, for that is taken to be accounted for as a debt; nor, as former writers have technically used the word, does it designate even a deposit to be returned with identity undisturbed, unless, indeed, the trust were undertaken gratuitously; though practically a warehouseman is a depositary who expects pay for his service. *Mandatum*, in the Roman law, has an agency sense far transcending the bailment *mandatum* of our English authors. In *Pignus*, the gist of the transaction consists in the transferred possession of a thing by way of security; and hence, where mortgaged chattels come into the secured party's possession in the same manner, it is hard to say that a difference of the epithets Pledge and Mortgage should keep the latter transaction out of a rightful place among bailments. To these several matters we shall recur in place in later pages.

§ 15. **Standard of Care and Diligence, etc., in Bailments.** — What care and diligence towards the property in his charge is exacted of a particular bailee, or what the standard of responsibility, is the most momentous of all inquiries in bailments. The elementary principle is that, independently of some special contract by which the parties have regulated the matter for themselves consistently with public policy, or of some act of legislation, a bailee's care and diligence must be according to the recompense intended. We mark off our standard of measurement, *slight, ordinary, great* (or more than ordinary), to meet the case; and so inversely for negligence, *gross* (or more than ordinary), *ordinary, and slight*, — if

indeed one may say that negligence, in a logical sense, is ever permissible. Here, then, is the standard : —

	The measure of care and diligence exacted of the bailee is : —	And the measure of negligence for which he becomes answerable is : —
I. In bailments for the bailor's sole benefit.	= Slight.	= Gross (or more than ordinary).
II. In bailments for mutual benefit.	= Ordinary.	= Ordinary.
III. In bailments for the bailee's sole benefit.	= Great (or more than ordinary).	= Slight.
IV. In exceptional bailments (Postmasters, Innkeepers, Common Carriers).	= An Exceptional Responsibility. (Approximating insurance in the two latter instances).	

To illustrate this principle of bailment responsibility, let us take a pair of scales, having an index finger at the pivot, and two separate dishes with equal weights to stand for the respective interests of bailor and bailee. On a balance of interests, the index finger points upward, — “ordinary diligence ; viz., that which persons of the same class, of average prudence, are wont to bestow upon their own property of the like description.” But a special weight in either dish disturbing the balance, this index finger is thrown out ; and public policy of course disarranges the scales as might the pressure of a human hand.

This homely illustration and the table preceding it may furnish the needful epitome of bailment responsibility. The common law, indeed, takes a common-sense standard of comparison, such as common-sense men know how to regulate their conduct by, and a common-sense jury to compel justice. Leaving purely moral duties to the forum of conscience, it makes consideration the leaven of contract obligation, and feather-edges bailment responsibility on either side of the *quid pro quo*. “Human experience,” it says, “justifies the common expectation that the party who works for reward

will take more heed than he who does not, and that he who reaps all the benefits of the transaction will be heedful to the utmost."

It has not escaped comment that an adjustment of rights and duties like this is inexact, nor that the standard of diligence might be more delicately graduated. Our unit, too, is "ordinary;" and yet ordinary diligence must differ with the nature and value of a particular thing, the peculiar risks to which it may be exposed, and the like. True, and yet the unit is such as men can apply to a particular state of facts; and no other standard has ever superseded the present in our practice. Rainbow colors blend imperceptibly, and yet the generality of people distinguish them.

§ 16. **The same Subject; other Tests attempted.**—Gross, ordinary, or slight negligence has a harsh sound; and from the Roman law modern scholarship extracts the following classification: (1) Fraud, or rather *dolo proxima*; (2) Negligence *in abstracto*, or the omission of that amount of diligence which an average householder ordinarily bestows upon his private affairs; (3) Negligence *in concreto*, or the omission of that amount which the particular person habitually bestows on his private affairs.¹ Here, however, is no antithesis, no convenient unit of comparison. Another method, perhaps more purely Roman, would be to contrast the negligence *in concreto* with the want of that extraordinary care which a vigilant man of business bestows; this latter serving as the standard of slight, opposed to gross, negligence.² But

¹ Amos Jurisp. 203.

² Poste Gaius, 394. Mr. Poste points out (ib. 394-397) what, if true, might well discourage further attempts to harmonize the Roman and English systems of bailment. He says that by the Roman law extraordinary care was required of the gratuitous borrower for use; of the mortgagee, the vendor, the conductor, the locator, and others. The principle appears to be, he adds, that when a contract was for the interest of both parties, although their interests were rather adverse than identical, each was responsible for the least negligence.

to this test are greater objections. Story, on the contrary, contends that the three-fold division of our common law conforms perfectly to that laid down by the civilians, who, he says, recognized three degrees of diligence, — *exactissima diligentia*, *diligentia*, and *levissima diligentia*; also three degrees of fault or neglect, — *lata culpa*, *levis culpa*, and *levissima culpa*.¹

In generalizing well, within the permitted limits of public policy, the mutual expectations of parties who enter into a bailment relation without distinctly expressing their own terms consists, perhaps, all the substantial advantage of such tests; and they who dislike the common-law standard of diligence and negligence fall, when most consistent, into a general contempt of all standards, so as to make each case a special issue of intent.² Yet the advantage of the

¹ Story Bailm. § 18. *Sed qu.*

² “Negligence in fact,” observes Mr. Amos, “is always the absence of that amount of alacrity or adroitness of mind which a person’s legal duty in the special circumstances demands.” Amos Jurisp. 203. Yet the question will recur, what legal duty did those special circumstances demand; and common-law authority conducts us back to the common-law standard for a reply.

Mr. Bigelow also observes that the modern tendency is to break away from such divisions, and to accept what he calls “the true doctrine of the Roman law” as to bailments, as well as to other subjects covered by the title “Negligence:” *i. e.*, to make the criterion, whether the party conducted himself in the particular situation as a man of prudence or carefulness or skill of the same business would have conducted himself, or as prudent or careful or skilful men of the same business generally conduct themselves in the like situation. Bigelow Torts, 266. We must respectfully dissent from the views of this careful writer. In the first place, the courts show little sign of breaking away from the classification of slight, ordinary, and great, where bailments are concerned. See § 35, *post*. Nor is it, as in general cases of negligence, a question here of mere conduct, but of conduct exercised towards some specific property, and moreover of conduct in a transaction which involves always the element of recompense, of advantage, mutual or on one side only. We distinguish the law of gift and sale upon this element of recompense; and in the obligations of bailment law a like distinction is found. Such a criterion as the foregoing is not specific enough to guide a jury; bailments occur in

common-law standard for cases where the parties have not made their original intent explicit is obvious; and it is enough to add that our courts have never relinquished it.¹

social as well as business relations; and though after all we mean to inquire whether the care that was needful under the circumstances was bestowed, there is always a relative degree of difference implied as between recompensed and non-recompensed bailees under corresponding circumstances.

¹ See Story Bailm. §§ 11-18. A forcible criticism of our three-fold test is presented by Mr. Justice Curtis in *Steamboat New World v. King*, 16 How. (U. S.) 474. Yet current decisions apply that test constantly. And the better sentiment of the courts favors retaining it, at all events, until something better can be found to supply its place. Lord Chelmsford, in *Giblin v. McMullen*, L. R. 2 P. C. 336 (1869), said recently: "Of course, if intended as a definition, the expression 'gross negligence' wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones." And see *Cashill v. Wright*, 6 E. & B. 891; *Beal v. South Devon R.*, 5 H. & N. 875, 881; 3 H. & C. 337, 341, per Crompton, J.

Among the latest American opinions on this point, that in *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, will be found strong and discriminating. And see *Griffith v. Zipperwick*, 28 Ohio St. 388; *Whitney v. Lee*, 8 Met. 91.

But the language of Mr. Justice Curtis is best offset by that of a successor on the same supreme bench of the United States, — Mr. Justice Bradley, — who has thus happily generalized the results of modern investigation in the courts of England and America, as to the standard of slight, ordinary, and great: "The defendants endeavor to make a distinction between gross and ordinary negligence, and insist that the judge ought to have charged that the contract was at least effective for excusing the latter. We have already adverted to the tendency of judicial opinion, adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform. than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called gross negligence. If very great care is due, and he fails to come up to the mark required, it is called slight negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called ordinary negligence.

There is noticeable, however, a decided preference, among the more exact of our modern jurists, for fitting to "diligence," instead of its correlative, "negligence," the adjective of comparison. A pithy remark of Baron Rolfe's, which has long circulated in the courts,¹ to wit, that gross negligence is the same thing as negligence, with the addition of a vituperative epithet, has helped greatly to this result.² "Diligence" has certainly the advantage of being an affirmative word, whereas one uses "negligence" relatively by way of denying to the transaction the requisite degree of diligence or care. This verbal choice will be duly heeded in these pages, notwithstanding many eminent authorities still use the terms interchangeably, and the practical difficulty comes perhaps "as directly" (to borrow the suggestion of one of our State

In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands; and hence it is more strictly accurate, perhaps, to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfilment of various contracts, we think they go too far; since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed. The compilers of the French Civil Code undertook to abolish these distinctions by enacting that 'every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it.' Toullier, in his commentary on the code, regards this as a happy thought, and a return to the law of nature. But such an iron rule is too regardless of the foundation principles of human duty, and must often operate with great severity and injustice." *Railroad Co. v. Lockwood*, 17 Wall. 382.

¹ Rolfe, B., in *Wilson v. Brett*, 11 M. & W. 113 (1843).

² See *Hinton v. Dibbin*, 2 Q. B. 646; *Austin v. Manchester R.*, 10 C. B. 454; *Grill v. Iron Screw Collier Co.*, L. R. 1 C. P. 612; *Briggs v. Taylor*, 28 Vt. 180, per Redfield, C. J.; *Steamboat New World v. King*, 16 How. 474; *Storer v. Gowen*, 18 Me. 177; *Mariner v. Smith*, 5 Heisk. 203. The point thus made is, that negligence is essentially culpable. To quote Willes, J., in *Lord v. Midland R.*, L. R. 2 C. P. 344: "Any negligence is gross in one who undertakes a duty and fails to perform it." A like criticism is suggested in Pothier. See *Jones Bailm.* 30; *Story Bailm.* § 17; *I. Pothier Obl.* 458 (Orleans ed.).

judges) "from the nature and extent of the duty in the particular case as from the phrase by which a breach of the duty is expressed."¹

§ 17. **Honesty and Good Faith required of Bailees; Criminal Accountability.** — Besides a certain degree of care and diligence suitable to the trust imposed, our law requires of every bailee the practice of honesty and good faith. A bailee should not sell, pledge, or otherwise deal with the thing as though he were full owner; and, as a rule, he cannot, by such misconduct, divest the general owner's title or debar him from recovering the property; though in many cases a bailee may innocently assign his own temporary interest, if for value, while under some circumstances the equity of a *bona fide* transferee for value without notice of infirmity of title, is found to avail against the defrauded bailor.² The continental, like our own jurisprudence and that of every enlightened country, permits not even the bailee for the bailor's exclusive benefit to pursue his trust dishonestly; and gross negligence itself, or the failure to bestow slight diligence, though designated sometimes *dolo proxima*, is but the next thing to fraud, and less censurable.³ In every contract relation, fraud vitiates, and the injured party who is blameless may seek redress.

Modern legislation seeks to fasten criminal accountability upon various classes of persons who, by the common law,

¹ Allen, J., in *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 295. In Part II. the phrase "gross negligence" will be further considered.

² As to the equity of a *bona fide* transferee see more especially *Pledge*, Part IV. c. 4. And in general see *post*, §§ 39, 52, 73, 107.

³ *Story Bailm.* §§ 19-22. forcibly combats the notion favored apparently by Sir William Jones and others, that gross negligence is tantamount to fraud. Civilian commentators speak of *dolus* in many passages as though its sense thus included the extreme *culpa*: but it is not clear that this *dolus* means the same as our word "fraud." Such disputation is more learned than edifying. Cf. *Jones Bailm.* 8, 10, 46; *Poste Gaius*, § 207; *Mytton v. Cock*, 2 Stra. 1099; *Tompkins v. Saltmarsh*, 14 S. & R. 275; *post*, Part II.

could not be punished for what was styled a mere breach of trust ; and, in some parts of this country, a bailee, converting to his own use the property committed to his keeping, may now be indicted for larceny.¹

§ 18. **Tortious Possessor liable absolutely.**—How far the rights and remedies of bailment parties are affected by the fraud and misconduct of either will incidentally appear hereafter. But let us observe here that in those *quasi* bailments which grow out of a tortious possession, the bailee must account absolutely for what he holds without color of right ; and this by the operation of public policy, for a contract relation is wanting. Thus, should one steal my boat, and then, concluding to pull it back, be overtaken by irresistible flood or tempest, the circumstance of a loss by wreck is of no avail, for the law pronounces him an insurer. Where, too, a vessel makes a tortious capture such as the law of belligerents fails to justify, the captor is held strictly accountable for any loss or damage sustained by the captured vessel, however accidentally caused, despite his prudent exertions.² A like principle is seen swelling the risks of the borrower or hirer, who, by departure from the terms of his trust, commits a breach of trust ; of bailees who misappropriate ;³ and, perhaps to some extent, of carriers who inexcusably deviate from the prescribed route.⁴ Two theories may be said to concur in producing this result : first, that any guilty invader of another's property rights should make full restitution ; second, that where mischief happens while one departs from the line of duty, whether wilfully or only negligently, he ought to make the innocent sufferer whole.

¹ As in case of a bailee for hired service. *Hutchinson v. Commonwealth*, 82 Penn. St. 472; *Phelps v. People*, 72 N. Y. 334.

² *Story Bailm.* § 614; *The Betsey*, 1 Rob. Adm. 93, 96.

³ *Fisher v. Kyle*, 27 Mich. 454; *Lucas v. Trumbull*, 15 Gray, 306; *Cullen v. Lord*, 39 Iowa, 302; *Wentworth v. McDuffie*, 48 N. H. 402; *Kennedy v. Ashcroft*, 4 Bush, 530.

⁴ *Post*, Common Carriers.

§ 19. **Agents or Servants in a Bailment.** — The bailment relation admits of the employment, on both sides, of agents or servants. To all such should be applied the general doctrines of agency; the bailor or bailee, under due circumstances, being chargeable accordingly as principal. In general, a bailee is answerable for the acts of those he employs under him in furtherance of the bailment purpose, so far as those acts are committed within the real or apparent scope of such a party's employment; not, however, for acts tortious and lying wholly outside of such scope, since here we find either that the agent transcended his authority, or that the act was so positively wrongful that legal authority to commit it cannot have been conferred.¹

There is this difference, in the eye of the law, between an agent and a bailee, that the one is a substitute for some person, while the other is a distinct individual, with his own separate interest in the thing.

§ 20. **Effect of Special Contract.** — Exceptions to the general doctrine of bailment may be created by the special contract of the parties themselves, who are at liberty to fix the time and mode of accomplishing the bailment purpose, and even to regulate the responsibilities of the relation; but with this general restriction, that the terms which public policy and legislation impose are not thus to be overleaped.² Thus, admitting that what we call public policy swerves about from one epoch to another, fundamental morality forbids that a bailee should stipulate for immunity against his own wilful misconduct,³ and American courts have denied, even to bailees without recompense, the privilege of being as negli-

¹ *Foster v. Essex Bank*, 17 Mass. 479; Schoul. Dom. Rel. 3d ed. § 489; Story Agency, § 261. But as to the exceptional bailments see Parts V., VI.

² Story Bailm. §§ 31-36 To the same purport is the civil law. *Ib.*; Jones Bailm. 48; Dig. 50, 17, 23; Dig. 17, 1, 39.

³ Story Bailm § 32; Doct. & S. 2. c. 38; Jones Bailm. 11, 48.

gent as they please ;¹ while as to innkeepers and common carriers, our law always bore hard upon them until recently, and even now only a moderate relaxation of the legal burdens is, in America at least, permitted.² Nor (though we shall find some curious discord of authorities on the point) ought one to be able to contract so as to become utterly unaccountable for the acts of his own agents or servants ; for, were the privilege granted, corporations might go scot free, and bailees in general find too easy opportunities for fraudulent collusion.³ If the bailee may by special agreement narrow his risks, so may he in like manner enlarge them ; but it would be violating good sense to construe dubious expressions in a contract so utterly to the bailee's disadvantage, where no moving consideration appears for assuming the special hazards.⁴ Special contracts in a bailment transaction need not be reduced to writing ; for the gist of the exception is the mutual and fair intent of the parties to conform to it.⁵

§ 21. **Other Cardinal Maxims stated ; Bailment and Contract for Bailment ; Compound Bailments.** — We may here lay down a few cardinal maxims in the law of bailments whose application will appear in detail hereafter. (1) Bailment arises only upon the corporeal possession of the thing by the temporary holder or his agent ; though there may, or may not be, a contract for some bailment. Thus, if I agree to take goods to-morrow on storage, there is a contract for a bailment, but no bailment arises until I take the goods.⁶ (2) Compound bailments may

¹ *Lancaster Co. Bank v. Smith*, 62 Penn. St. 47. See *Archer v. Walker*, 38 Ind. 472.

² See *Innkeepers and Common Carriers*, *post*.

³ *Ib.* ; *Peek v. North Staffordshire R.*, 10 H. L. 473, per Blackburn, J.

⁴ See *Treffitz v. Canelli*, L. R. 4 P. C. 277 ; *Belden v. Perkins*, 78 Ill. 449 ; *Story Bailm.* § 33.

⁵ *Conway Bank v. Am. Express Co.*, 8 Allen, 516. This subject will be considered in detail hereafter.

⁶ See *post*, §§ 34, 94, 102.

exist, involving the mingled undertakings of custody, carriage, or work upon a thing; or again, so that one part of the service is upon recompense and another gratuitous; and a bailee's liability may shift accordingly.¹

§ 22. **The same Subject; whether Bailor is Owner; Title of Bailee.** — (3) A bailment need not be by the full owner of a thing; for privity between bailor and bailee suffices, and if the bailor has a special property in the thing, he may bail it for various purposes. A bailee has only to undertake and pursue his undertaking in good faith towards the person from whom he received the thing. But while he should not voluntarily dispute his bailor's title, he is bound at his peril to regard paramount claims of ownership brought to his attention while he has possession.²

(4) Furthermore, the bailee's possession constitutes a sufficient title to enable him to maintain remedies against all others who invade his rights, yielding only to a superior title, and to such interest of his bailor as may consist with their mutual undertaking. Even a mere finder or other naked bailee without reward may maintain his possession against all strangers who would deprive him thereof.³

§ 23. **Burden of Proof in Suits against the Bailee.** — Before we pass to the extended consideration of the several classes of bailments, this important and perplexing inquiry deserves final attention. Upon whom should rest the burden of proof when a bailee is sued for culpable loss or injury? In litigation of this sort, particularly under the law of common carriers, each party to the bailment is so eager for the advantage of putting his opponent to the proof, that he attempts to generalize upon what the breath of circumstances might alter.

¹ In *Mariner v. Smith*, 5 Heisk. 203, gold was bailed without reward, to be sold if the market premium rose to a certain height, otherwise only to be kept in custody.

² See *post*, § 33.

³ *Post*, §§ 54, 80, 109.

Nothing more readily shifts about in different stages of pleadings and evidence than this quicksilver which we denominate the burden of proof. If, then, out of the abundant maxims laid down, it seems hard to compose a clear summary, this is because the maxims depend so much upon special facts, and the actual situation of a case.

English courts, and those of several of our leading States, appear to reason generally that, wherever negligence is the foundation of a suit, the plaintiff must prove his case affirmatively throughout; and they deduce the corollary, that a bailee sued because of his negligence or inadequate diligence as to the thing bailed need not disprove, but, rather, may leave the bailor to prove him negligent if he can. Hence their inference, chiefly available in ordinary bailments for hire, that a bailee's breach of duty is not to be for assumption, but positive proof; and that merely to prove loss or injury, that the bailor's goods are not on hand in a suitable condition, or not on hand at all, at the time when the bailee was to turn them over, does not of itself establish the bailee's negligence and default.¹

¹ See Story Bailm. § 410 and notes; *Finucane v. Small*, 1 Esp. 315; *Gilbart v. Dale*, 5 A. & E. 543; *Midland R. v. Bromley*, 17 C. B. 372; *Butt v. Great Western R.*, 11 C. B. 140; *Lamb v. Western R.*, 7 Allen, 98; *Smith v. First Nat. Bank*, 99 Mass. 605; *Runyan v. Caldwell*, 7 Humph. 134; *Cross v. Brown*, 41 N. H. 283; *Brown v. Johnson*, 29 Tex. 40. See a valuable review of this subject by Judge Edmund H. Bennett, in 5 Am. Law Rev. (Jan. 1871), p. 205.

Judge Story inclines to the view that, with all but the exceptional classes of bailment (though why the rule should there be peculiar is not obvious), the burden of proving negligence is on the bailor, and that proof merely of loss is not enough to put a bailee on his defence. Yet this distinguished writer admits that there are many discrepancies in the authorities, and that the burden of proof may shift, in complicated cases, from one party to the other. Story Bailm. §§ 278, 410. He concedes, further, that where the bailor demands a thing loaned, and the bailee makes a general refusal without offering any special excuse, the bailor may, *prima facie*, recover. Story Bailm. §§ 213, 278; *Beardslee v. Richardson*, 11 Wend. 25.

Now, granting that all mankind are presumed to have done their duty, and that, in the majority of instances, actions of tort whose gist is negligence put the *onus probandi* heavily upon a plaintiff who comes into court alleging an injury to himself through the wrongful act of another, the peculiar situation of a thing bailed, as between bailor and bailee, is an impressive feature of our present case, which must not be kept out of the reckoning. To allege that one has carelessly run down a child, or broken another man's wagon, or endangered a person's life by malpractice, requires a *prima facie* case to be made out by the plaintiff, who has his proof at command. But on the other hand, where one receives possession of a chattel in a certain condition, and fails at the proper time to redeliver it at all, or redelivers it with marks of injury such as only culpable carelessness would probably have caused, it is the bailee who should open his mouth and make an explanation to relieve himself. Unless the bailor accompanied his property or had a certain oversight, — as where the owner of a hired horse rides with the hirer, or an inn-keeper's guest puts his own watch under his pillow, or a drover goes in the train with his cattle, — the facts attending loss or injury must be peculiarly within the bailee's own knowledge. Here, too, the action sounds in contract quite as much as tort, for negligence. And thus do we find it quite reasonably asserted, as the rule of many States, that where property placed in a bailee's hands in good condition is returned by him badly damaged, or not returned at all, the burden of exculpation is upon himself; more especially if the loss could not ordinarily have occurred without such negligence.¹

¹ Collins v. Bennett, 46 N. Y. 490; Brown v. Waterman, 10 Cush. 117; Boies v. Hartford R., 37 Conn. 272; McDaniels v. Robinson, 26 Vt. 316; Logan v. Mathews, 6 Penn. St. 417; Funkhouser v. Wagner, 62 Ill. 59; Goodfellow v. Meegan, 32 Mo. 280; Vaughan v. Webster, 5 Harring. 256; Bennett v. O'Brien, 37 Ill. 250; Cass v. Boston & Lowell

Where the legal responsibilities of the bailment have been qualified at the outset by a valid contract, the bailor who would make out his case of loss or damage ought to allege

R., 14 Allen, 448 ; Safe Deposit Co. v. Pollock, 85 Penn. St. 391. Such, too, is the rule expressly confirmed in Louisiana. Ford v. Simmons, 13 La. Ann. 397 ; notwithstanding the Code as referred to in Story Bailm. § 411. Pothier upholds the same view. Pothier Contrat de Louage, n. 199, 200 ; Story Bailm. § 411. And it is the rule of the civil law. Ib. ; Story Bailm. § 278.

The convincing statement of Peckham, J., in Collins v. Bennett, *supra*, approves this rule, in the case of a hired horse returned foundered to the bailor. As to depositaries for hire, Park, J., alludes to the conflicting state of the authorities in Boies v. Hartford R., *supra*. Wiser v. Chesley, 53 Mo. 547, applies the rule to the case of an innkeeper. And this is doubtless the doctrine as to common carriers. Story Bailm. § 529 ; Forward v. Pittard, 1 T. R. 27 ; Michaels v. N. Y. Central R., 30 N. Y. 564, and many other cases cited under that head.

Admitting the danger of wide generalizations on this subject, and granting the force of special circumstances in each case, we may perhaps fairly reach these conclusions : (1.) That the bailor who charges his bailee with losing or injuring the thing bailed to him, must make out his *prima facie* case ; that is, he must show the creation of the particular bailment in fact, and the delivery on his own part of the specified thing in due condition, with corresponding acceptance by the bailee ; also, the bailee's default of final delivery over, or else his final delivery of the thing in unsuitable condition, as the case may be. And whatever might obstruct a *prima facie* showing to this point, and justify an inference that the thing was injured by himself or his agents, or by his or their participation in the mischief, or that its inherent qualities would naturally have developed the mischief, — all this the plaintiff must overcome to make out his case. (2.) The *prima facie* case being thus made out as claimed, showing (a) that the property bailed for a certain purpose was not delivered back or over at all by the bailee as contemplated, or (b) that when delivered over it was found so damaged that probably the bailee or his agent caused the injury, the inference is deducible that the bailee is to blame and must answer. And now it rests upon the defendant bailee to explain the loss and exonerate himself ; which he may do by showing (a) that the loss or damage was due to some special cause which ought specially to excuse him ; or (b), more generally, that he, the bailee, was not culpably negligent. See cases *supra*. (3.) But if the bailee, under such circumstances, shows some cause of loss or damage to the thing, such as ought legally to excuse him, he need not go further and prove affirmatively that no negligence on his part operated in producing that

and stand upon the special undertaking. And if the bailee shows in defence that the loss or damage was due to some cause lawfully excepted by the contract — as where a carrier's contract expressly exempts him from bearing the risk of losses by accidental fire — he makes out his *prima facie* exculpation, so that, unless his own proof of such loss or damage incidentally established such cause as the contract fails to excuse, the *onus* is upon the plaintiff to shake his exculpation.¹ All bailees, with or without a special contract, are *prima facie* excused, when they show loss or injury by act of God or of public enemies; and ordinary bailees in a variety of lesser instances, such as fire, loss by mobs, or

cause; but may rest upon a showing which, on the face of it, leaves him sufficiently exonerated. The burden now shifts back to the plaintiff bailor, who is to overcome, if he can, the bailee's *prima facie* exoneration. See *Railroad Co. v. Reeves*, 10 Wall. 176. (4.) If the bailee has shown in defence some cause of loss or damage, such as robbery, burglary, or theft, which might or might not excuse him, the jury must well weigh all the circumstances presented. 2 Kent Com. 580, 581; *Story Bailm.* § 338; *Tancil v. Seaton*, 28 Gratt. 601; 45 N. Y. Super. 245. But robbery, burglary, or theft does not *per se* establish culpable negligence. *Wylie v. Northampton Bank*, 119 U. S. 361; *Schermer v. Neurath*, 54 Md. 191; *Claffin v. Meyer*, 75 N. Y. 260. (5.) Under most other circumstances the main burden of proving remissness of duty on the bailee's part will devolve upon the bailor or owner; and if, on demand of the property or the presentation of his claim for damages before he brings suit, the bailee offered any explanation of the loss or injury, this he should introduce as part of his *prima facie* case. *McCarthy v. Wolfe*, 40 Mo. 520. Where upon the issue of culpable carelessness two inferences equally reasonable might be drawn from the evidence, the verdict of a jury will not be disturbed. *Carrington v. Ficklin*, 32 Gratt. 670. But a bailor makes a *prima facie* case when he shows such loss or damage to the thing as does not ordinarily happen where the care which the law requires in the particular kind of bailment is exercised. 14 Mo. App. 431. See *post*, § 205, as to pledge.

¹ See Part VI., c. 8, *post*; *Sutro v. Fargo*, 41 N. Y. Super. 231; *Cochran v. Dinsmore*, 49 N. Y. 249; *Farnham v. Camden & Amboy R.*, 55 Penn. St. 53; *Transportation Co. v. Downer*, 11 Wall. 129; *Gray v. Bates*, 99 Mass. 263.

Contra, *Union Express Co. v. Graham*, 26 Ohio St. 595; *Swindler v. Hilliard*, 2 Rich. 286.

robbery.¹ Common Carriers and Innkeepers, as we shall see hereafter, have to bear, apart from special contracts and our later legislation, a variety of risks such as would in no sense impute to them positive negligence or misconduct.

¹ See *Wilson v. Southern Pacific R.*, 62 Cal. 164, as to loss by fire; also *White v. Colorado Central R.*, 3 McCr. C. 559.

PART II.

BAILMENTS FOR THE BAILOR'S SOLE BENEFIT.

GRATUITOUS SERVICE ABOUT A CHATTEL.

§ 24. **Classification of this Chapter.** — In treating of the present class of bailments we are to consider : —

I. Matters preliminary, including delivery in bailment.
II. Accomplishment of the bailment purpose. III. Termination of the bailment.

§ 25. **Matters Preliminary ; Nature of Undertaking.** —

I. Matters preliminary; including delivery in bailment. Manifestly no arbitrary rule of division among the common pursuits of life could do justice to the present topic; for workmen, artisans, agistors, warehousemen, wharfingers, factors, even carriers, whatever compensation it may be their usual custom to receive, are bailees for the bailor's sole benefit in each individual case where the service is gratuitously undertaken. Among bailments for the bailor's sole benefit are, of course, to be reckoned those whose object is the benefit of any third person on his side; as, for instance, where something is to be transported free, not so much for the consignor's, as the consignee's, advantage.¹ And, as in all other topics of bailment law, benefit, recompense, or advantage is viewed with reference not to the actual result, but the purpose of the undertaking.

¹ Story Bailm. § 41; *Fay v. Steamer New World*, 1 Cal. 348; *Michigan Central R. v. Carrow*, 73 Ill. 348.

The purpose of the gratuitous bailment is multiform ; admitting, indeed, of much the same variety as the bailment for mutual benefit ; pledge, which necessarily involves the idea of a mutual recompense, constituting the only clear exception. To be more explicit, one may gratuitously (as he might likewise upon hire) take another's chattel : (1) to keep it in custody ; or (2) to perform some work upon it ; or (3) to carry it from one place to another. Under one or another of these three classes do such bailments commonly range ; custody of a thing being a passive sort of relation as compared with the other two. A close analysis will show that in numerous instances bailments are so compounded of two or more of these three elements, that the discussion of diligent performance might arise separately upon custody, performance of work and carriage ; as if a friend of mine, who is a watchmaker, should, without an intended recompense, receive my watch in the country, carry it to his store in the city, there repair it, and then keep it in custody awaiting my convenience to call for it. Were such a watchmaker expected to charge for repairing alone, this would illustrate that continuous bailment transaction compounded of recompense and non-recompense undertakings, which is by no means inconceivable.¹

§ 26. **Division of Depositum and Mandatum inapt.** — But Sir William Jones, following Lord Holt, and Judge Story, the successor of both, have preferred discussing bailments for the bailor's sole benefit under two distinct titles taken somewhat at hap-hazard from the Roman law.² They give us **DEPOSITUM**, a Deposit, and **MANDATUM**, a Mandate ; of which the former aims to take in all bailments for gratuitous custody, while the latter comprehends both those for gratuitously working upon, and those for gratuitously carrying a thing, or in a word the residue. **DEPOSITUM**, a Deposit, they define as the bailment of

¹ *Supra*, § 21.

² Story Bailm. §§ 41, 137 ; Jones Bailm. 22, 36, 117 ; Holt, C. J., in *Coggs v. Bernard*, 2 Ld. Raym. 909.

a chattel or chattels to be kept by the bailee without reward, and delivered according to the special purpose of the bailment; the person who makes the deposit being the *depositor*, and he who receives, the *depository*.¹ *MANDATUM*, a Mandate, is declared to be the bailment of a chattel or chattels in regard to which the bailee engages to do some act without reward; the bailor being here the *mandator*, and the bailee the *mandatary*.²

¹ Story Bailm. § 41; Jones Bailm. 36, 117; Pothier Traité de Dépôt, n. 1.

² Story Bailm. § 137; 2 Kent Com. 568; Jones Bailm. 52, 117. Such a method of treatment appears open to grave objections. (1.) Here is a transplanting of foreign terms which do not bring their full foreign flavor. For, as to *DEPOSITUM*, the civil law made material distinction in respect of remedies between *voluntary* deposits, — or such as were made upon ample opportunity for deliberation and mutual consent, — and *miserabile depositum*, — or that which occurred through fire, shipwreck, or other calamity, where one in distress had to confide his property to whomsoever was about; which is a distinction of no consequence in our law. Story Bailm. § 44; Jones Bailm. 48; Colquhoun Rom. Civ. Law, § 2068; Pothier Traité de Dépôt, n. 75. Again, Roman deposits were divided into simple deposits and sequestrations; the former designating the common placing in custody, and the latter a delivery in custody to some stakeholder, whether as between man and man, or judicial; a division not without its uses, yet not practically recognized in the common law. Story Bailm. § 45; Colquhoun Rom. Civ. Law, § 2069; Pothier Traité de Dépôt, n. 1. Furthermore, the civilians made much of distinguishing between *depositum* and *mutuum*; whereas, as already shown, we have no such bailment as *mutuum* at all. Story Bailm. § 47; Jones Bailm. 64; *Supra*, § 6; Poste Gaius, § 300. Still more of an exotic is *MANDATUM* a word cautiously employed by Lord Holt (*Coggs v. Bernard*, 2 Ld. Raym. 909), and deemed appropriate by Sir William Jones only in a limited sense. Jones Bailm. 53. The Roman mandate, in fact, — a term apparently derived from the fiction of giving one's right hand as symbolical of delivering to another authority to act, — meant in the vernacular simply to constitute a gratuitous agency. A wide-sweeping class of trusts was this; not confined to personalty, nor to things specific as distinguishable from property in the mass, nor necessarily occupied with property at all. An unpaid carrier was, for the time being, a mandatary; but so, too, was an unpaid oral messenger, or a naked attorney. A mandate might be general or specific, conditional or unconditional, express or presumable, given before or given during the progress of an affair. Colquhoun Rom. Civ. Law, §§ 1736-1739; Story Bailm. §§ 137-139. Even in that aspect which has so commended the term to

On the whole, the employment of these technical terms appears disadvantageous. And the clearest opinions on the

our bailment jurists, — namely, the gratuitous nature of the service to be rendered, — *mandate* is not a wholly appropriate word; for, though nominally a gratuitous undertaking, the civil *mandate* still permitted of the *honorarium*, whose collection, as some assert, could, under a certain procedure, be enforced. Colquhoun, § 1731; Poste Gaius, III. § 162. The Louisiana Code distinctly provides that a *mandate* need not be gratuitous. *Waterman v. Gibson*, 5 La. Ann. 672; *Lea, J., in Lafourche Nav. Co. v. Collins*, 12 La. Ann. 119. One who had a *mandate* forced in a measure upon him, seems to have been held, in Roman jurisprudence, less strictly accountable than an ordinary *mandatary*. Colquhoun, § 1742. Other foreign peculiarities which still adhere to *depositum* and *mandatum* will further appear presently.

(2.) The division of *Depositum* and *Mandatum* is not, we apprehend, a logical one; for the latter appears the generic term, and the former specific. To reason, like Sir William Jones, that *mandate* lies simply in feaseance, and *deposit* in custody, is inaccurate, as Judge Story illustrates by the bailment of a living animal which must not only be kept, but fed and exercised; and, according to the latter writer, the distinction lies between the principal and accessorial object of the trust; which again may be thought refining to no great purpose. Story Bailm. § 140; Jones Bailm. 53. Lord Holt and Sir William Jones took care to put all gratuitous undertakings, whether to do work upon or to carry things, under the head of *mandate*, so long as they were not to be styled *deposits*. *Coggs v. Bernard*, 2 Ld. Raym. 909, 913; Jones Bailm. 117. But to the compound elements possible in various bailments, we have elsewhere alluded (*Supra*, § 21; *Mariner v. Smith*, 5 Heisk. 203); and, whether *deposit* or *mandate*, or both together, the general rule of gratuitous responsibility remains the same.

(3.) Both *Mandate* and *Deposit* are words whose popular, nay legal, English sense, may import something quite unlike a bailment. We speak of "*Mandate*" as a judicial precept. Bouv. Dict. "*Mandate*;" Jones Bailm. 53. And that which our bailment jurists have styled "*Deposit*," mercantile men commonly call "*Special Deposit*;" nor even thus would the bailment term fit, unless the special *deposit* was gratuitous. Our familiar *deposit* with a banker is in no sense a bailment, but the creation of a debt with the expectation that the creditor shall draw for his equivalent. Bouv. Dict. "*Deposit*;" Story Bailm. §§ 84, 88; *Foster v. Essex Bank*, 17 Mass. 479; *Brahm v. Adkins*, 77 Ill. 263; *Rankin v. Craft*, 1 Heisk. 711; *Howard v. Roeben*, 33 Cal. 399; Miller J., in *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Wright v. Paine*, 62 Ala. 310.

The ordinary bank *deposit* or general *deposit* is sometimes styled in

gratuitous bailee's responsibility are those which, discarding catch-words so apt to trip the unwary when used for title-headings, proceed upon a sound apprehension of the principle underlying the various modes of bailment accomplishment.

§ 27. **Fundamental Rules applied where Bailment is founded in Contract.** — Bailments for the bailor's sole benefit are commonly founded in contract and an express undertaking, though the relation may be constituted more generally by any possession not wrongfully acquired. Here the familiar rules apply as to the parties capable of contracting; for infants, lunatics, and to some extent married women, are placed under peculiar disabilities; while fraud, palpable error, and undue constraint of will, operate towards vitiating the undertaking.¹ But an infant, or other bailee placed under a legal disability, who might not be liable for a careless loss or misuse, must nevertheless restore where he may, and not use his privilege to misappropriate.² Even infants might be held answerable out of their estate for unlawful conversion, on the ground that it is the contract and not the tort of such persons that the law relieves.³ An adult bailee from an infant without reward will be bound on his side, while the infant's choice, on reaching discretion, sanctions the full operation.⁴ Such bailment should not, of course, contravene the rule of sound morals or public policy. And, in fine, as mutual assent is always needful, whether evinced by words or acts, no one becomes responsible, even as a gratuitous bailee, where goods are surreptitiously put in his carriage or thrust upon his per-

our books an "irregular deposit," — a term which to those not familiar with Pothier and continental modes of classification might appear a misnomer. Story Bailm. § 84, citing Pothier *Traité de Dépôt*, n. 82, 83.

¹ Story Bailm. §§ 50, 162; 2 Kent Com. 450. See Schoul. Dom. Rel. §§ 54, 400, 410, and general works on Contracts.

² *Mills v. Graham*, 4 B. & P. 140.

³ *Towne v. Wiley*, 23 Vt. 355; Story Bailm. § 50; Schoul. Dom. Rel. §§ 423, 424.

⁴ La. Code (1825), art. 2906.

son, wholly without his knowledge and assent;¹ though if, upon ascertainment of this fact, he went on with the trust, this might bind him.

§ 28. **Bailments not strictly upon Contract ; Finding ; Attaching ; Stakeholding, etc.** — But a bailment of the present class might be constituted where the undertaking was not strictly upon contract, or circumstances, at least, rendered the mutual assent impossible. The necessary deposit of the civilians, made under sudden pressure of overwhelming calamity, has been alluded to ; and we may assume that a similar trust might be created at the common law without very strict showing of a mutual understanding.² Intermeddling with or converting another's property, too, would render one liable to a greater or less degree, and in an extreme case bind him very strictly.³ And the case of a finder of things may well be referred to this same head ; for the mere fact of coming into voluntary possession of another's property will oblige one, if acting gratuitously, to use it with the care of a bailee for the bailor's sole benefit ; or, if acting with promise of reward, to use it like a hired bailee. Finders of things upon land, un-

¹ Story Bailm. §§ 59, 60, 156, 157 ; Lethbridge *v.* Phillips, 2 Stark. 544 ; Michigan Central R. *v.* Carrow, 73 Ill. 348 ; Fay *v.* Steamer New World, 1 Cal. 348 ; Green *v.* Birchard, 27 Ind. 483 ; Foster *v.* Essex Bank, 17 Mass. 479.

² *Supra*, § 26.

³ In Story Bailm. §§ 189, 190, comment is made upon a class of contracts, under the Roman law, which comprised cases where a party spontaneously, and without the owner's knowledge or assent, intermeddled with his property, to do work upon it, carry it, etc. Such an officious party was styled *negotiorum gestor* ; and whether his responsibility was that of a bailee for recompense, or one without recompense, depended upon the nature and circumstances of the undertaking. Pothier *Contrat de Mandat*, n. 167-228. The Louisiana Code makes similar allusion to the *negotiorum gestor*. Bayon *v.* Prevot, 4 Mart. 58. And though the common law distinctly mentions no such personage, an analogous principle is in certain instances applied. Story Bailm. § 190 ; Nelson *v.* Macintosh, 1 Stark. 237 ; Drake *v.* Shorter, 4 Esp. 165 ; Burke *v.* Trevitt, 1 Mason, 96 ; Goodenow *v.* Snyder, 3 Iowa, 599. See *supra*, § 18.

like salvors by water, can claim no legal recompense, but only the reimbursement of reasonable expenses.¹

Among bailees or *quasi*-bailees, whose undertakings are not strictly upon contract, may likewise be reckoned officers of the law who seize or attach goods; though whether such bailment be, generally speaking, one without recompense to the bailee, may well be questioned.² Under the attachment process which prevails in many parts of the United States, New England, for instance, this attaching officer bails the chattels to some third person, as keeper, who thus becomes the *quasi* bailee for all parties in interest.³

Whether, in sequestration or stakeholding, the recipient of the thing in litigation or dispute should be treated as a bailee of the present class will depend, of course, upon his undertaking for a recompense or not; but the undertaking itself to keep and deliver over specific property to the rightful party would make him virtually a bailee.⁴ Similar considerations apply to the payment of money into court pending controversy, which ought, according to the safer practice, to be held by the clerk as a specific, and not a general deposit.⁵

§ 29. **Test of Recompense or No Recompense.** — It must often be a delicate task to determine whether or no a certain bailment was for the bailor's sole benefit, so prone are bailees

¹ 2 Kent Com. 356, 357; *Nicholson v. Chapman*, 2 H. Bl. 254; *Wentworth v. Day*, 3 Met. 352; *Marvin v. Treat*, 37 Conn. 96; *Story Bailm.* §§ 121 *a*, 621 *a*; *Millcreek Township v. Brighton Stock Yards Co.*, 27 Ohio St. 435.

² *Burke v. Trevitt*, 1 Mason, 96; *Cross v. Brown*, 41 N. H. 283; *State v. Fitzpatrick*, 64 Mo. 185; *Story Bailm.* § 124; *Harrington v. King*, 121 Mass. 269; *Thayer v. Hutchinson*, 13 Vt. 504. The New York rule regards the bailment as, in effect, one for hire. *Witowski v. Brennan*, 41 N. Y. Super. 284; *Phelps v. People*, 72 N. Y. 334.

³ *Story Bailm.* § 130, and cases cited.

⁴ *Bouv. Dict.* "Sequestration," "Stakeholder;" *Story Bailm.* §§ 45, 103, 124; *Gaius*, III. § 207.

⁵ See *Mott v. Pettit*, 1 N. J. L. 298; *Western Marine & Fire Ins. Co., in re*, 38 Ill. 289; *Redf. Carriers*, § 634. *Contra*, *Aurentz v. Porter*, 56 Penn. St. 115.

who have made no express agreement in advance, to assert their rights according to the issue of the undertaking; charging for services, perhaps, if it turn out well, but if the reverse, then claiming the advantage of the lowest grade of responsibility. Evidence must determine in such a controversy, and a jury should weigh it well.¹ If the bailee received the thing in the usual course of his business, and business usage or his known method of dealing with other customers gave him the right to demand compensation, then the trust, though accepted without express reference to a charge for services, is not to be taken as gratuitous.² And here the bailee's silent determination to charge nothing is of no avail, inasmuch as he ought to have made such determination known to his bailor.³ But attendant circumstances should be allowed their weight; and where one undertakes for a near relative or personal friend, or out of mere charity or favor, and more especially if accomplishing the trust puts him to little outlay of time, trouble, and skill, and the bailment lies outside his remunerated field of labor, we may well presume the undertaking to have been gratuitous.⁴ In short, where the undertaking is in the line of one's usual business it may be presumed a bailment upon recompense; otherwise, a bailment without recompense; but in any case recompense or non-recompense is a question of fact.

¹ *Pattison v. Syracuse Nat. Bank*, 4 *Thomp. & C.* (N. Y.) 96; *Lobenstein v. Pritchett*, 8 *Kan.* 213; *Mariner v. Smith*, 5 *Heisk.* 203; *Story Bailm.* § 57; *Kinchelo v. Priest* (Mo.), 1 *S. W.* 235.

² *Pattison v. Syracuse Nat. Bank*, *supra*; *Kirtland v. Montgomery*, 1 *Swan*, 452.

³ *Second Nat. Bank v. Ocean Nat. Bank*, 11 *Blatchf.* 362.

⁴ *Dart v. Lowe*, 5 *Ind.* 131. See *Lafourche Nav. Co. v. Collins*, 12 *La. Ann.* 119. The reader is reminded that a contemplated benefit to the bailee, contingent, indirect, and uncertain, will, like a money recompense, render the bailment one for hire and not gratuitous. A bailment of the class at present described should be wholly without intended recompense to the bailee. See *Newhall v. Paige*, 10 *Gray*, 368; *Story Bailm.* § 153.

§ 30. **Servants or Agents in such Bailments; Bank Officers, etc.**—So, too, in the case of one's servant or agent, it may be a matter of doubt whether a thing gratuitously accepted was accepted by the party in a representative capacity, or so as to bind him personally. The main principle involved has been discussed in some modern cases with peculiar reference to the dangerous practice, pursued by banks organized for a general deposit business, of taking into their safes the valuables of favored individuals for their mere accommodation; these valuables being commonly contained in a box or sealed package. Here, again, we have an issue mainly of fact upon all the evidence submitted.¹ The voluntary act of a bank's executive officer in receiving one's personal property on special deposit would not, as sound authorities hold, make the bank *per se* liable; but if such deposit was known to the bank directors or management, and they acquiesced in the arrangement, and the more so if they expressly sanctioned it, this would constitute a bailment to the bank, and not to the bank officer himself.² Yet possibly the corporation might here throw the responsibility upon its managers by showing that the practice which the directors sanctioned was *ultra vires*, and such as could not bind the bank;³ though later opinion refuses to admit such a plea.⁴ On the whole, we may confidently assert that the reception of special deposits by a bank of general deposit is so far out of its regular course of doing

¹ *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. 96.

² *First Nat. Bank v. Graham*, 79 Penn. St. 106.

³ It has been suggested that the national banks incorporated under act of Congress, June 3, 1864 (U. S. Rev. Stats. 1878, §§ 5133-5156), have no authority to take special deposits gratuitously. *Third Nat. Bank v. Boyd*, 44 Md. 47, 61, per Bartol, C. J.; *Wiley v. First Nat. Bank*, 47 Vt. 546; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278. But cf. Woodward, J., in *First Nat. Bank v. Graham*, 79 Penn. St. 106. The Supreme Court of the United States holds a national bank liable in such cases. *National Bank v. Graham*, 100 U. S. 699; *Wylie v. Northampton Bank*, 119 U. S. 361.

⁴ *National Bank v. Graham*, 100 U. S. 699.

business, that no cashier or other executive officer can bind the corporation to such a bailment without at least the general or special permission of the directors.¹ Bank robberies,

¹ See Allen, J., in *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Giblin v. McMullen*, L. R. 2 P. C. 327.

Our latest decisions appear at variance concerning the extent of authority requisite for proof, in order to bind a bank for the act of its cashier or teller, who has received a special deposit gratuitously. In *Foster v. Essex Bank*, 17 Mass. 479 (1821), a masterly opinion was pronounced by Parker, C. J., from which the following is an extract: "Notwithstanding the act of incorporation gives no particular authority or power to receive special deposits; and although the verdict finds that there was no regulation or by-law relative to such deposits, or any account of them required to be kept and laid before the directors or the company, or any practice of examining them; yet as it is found that the bank, from the time of its incorporation, has received money and other valuable things in this way; and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the building and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited; the corporation must be considered the depository, and not the cashier or other officer through whose particular agency commodities may have been received into the bank." This view of the law finds casual support from Lord Chelmsford, in a recent case, *Giblin v. McMullen*, L. R. 2 P. C. 317 (1869), though its decision did not really turn upon that point. Still more recently was that opinion warmly commended, and its doctrine applied, in a Pennsylvania case. *First Nat. Bank v. Graham*, 79 Penn. St. 106 (1875). And here the court expressly declared that the rule laid down in *Foster v. Essex Bank*, with reference to the old State banks, applied likewise to the national banks created under act of Congress of 1864. "If the deposit," says Woodward, J., "was known to the directors and they acquiesced in its retention, a contract relation was created by which the defendants should be held bound." See also 85 Penn. St. 91.

But in New York, *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, likewise decided in 1875, bears against the right of these national banks to become special depositories. Allen, J., here uses the following language in the course of an able and extended discussion of the precedents: "A corporation can only act by agents; and it follows that it cannot be subjected to the responsibilities and liabilities of a bailee except by the acts and contracts of its agents duly authorized, or by agents acting within the scope of their general powers and apparent authority under circumstances which would estop the corporation from denying that their

involving the disappearance of private funds in large amounts from the corporation vaults, have of late years become so frequent in this country as to expose the mutual disadvantage of

real was not co-extensive with their apparent authority, or that they were not authorized to exercise the powers usually delegated to like officers and agents in other corporations of the same character. . . . The deposit of these bonds cannot be distinguished from a deposit of jewelry or plate, or other valuable property, and was a special transaction not within the ordinary course and business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducements to burglars and robbers from without, and might prove of greater temptation to dishonesty on the part of clerks and employes, within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation by the executive officers, *or without the special authority of the board of directors*, and a single transaction was without the general scope of the powers and duties of the executive officers of the institution." 1b. 285, 289. Not without some further suggestions as to the possible *ultra vires* of such a practice by corporations of the present character, he rests on a different ground the decision; which was in effect that no evidence appeared, showing that the directors had delegated to the executive and ministerial officers of the bank authority to accept the special deposit in question. A point incidentally involved here was, that not even the bank's proffer to buy and sell securities, as part of its business, would amount to an undertaking to take such valuables on special deposit. The principles thus laid down receive some support from *Wiley v. First Nat. Bank*, 47 Vt. 546, which, however, goes rather to establish the *ultra vires* of such a practice on the part of our national banks. But cf. 100 U. S. 699, *supra*.

But, to come to a comparison of facts in all these cases, it may be submitted that the above conflict of opinion is more apparent than real. For in *Foster v. Essex Bank*, the early Massachusetts case first referred to, a memorandum of the deposit (consisting of gold) was made out, which bore not only the signature of the cashier, but that, too, of the president, in whose presence the gold was weighed; and while the directors were not shown to have known of this particular deposit, nor to have expressly delegated authority to receive it gratuitously, yet it clearly appeared that the practice of receiving such deposits had long existed, and that the directors knew so. *Giblin v. McMullen*, the English case, raised no direct issue of authority in the bank officers, but the right of receiving on special deposit was taken for granted. And in the Pennsylvania case, *First Nat. Bank v. Graham*, the statement of facts showed that the depositor was a lady, to whom the cashier gave quite an explicit memo-

this loose trust, and stimulate the organization of separate companies to serve for hire as safe depositaries.¹

§ 31. **Subject-matter of Bailment; Personal Property.** — Concerning the subject-matter of the present bailment, as of all others, our law (unlike the civil law of mandates) restricts it, not only to property, but to personal property; under which head are to be grouped not corporeal chattels alone, or things in possession, but likewise every kind of incorporeal chattels or choses in action, of which writings or other instruments

random of the government bonds which she left on deposit; that the president's subsequent conduct amounted to a clear confirmation on his part of the cashier's authority; and that it had been an admitted practice, acquiesced in by the directors, for the bank to receive such deposits from their customers. But in *First Nat. Bank v. Ocean Nat. Bank* there was quite a different showing. The special depositor was another bank whose patronage the officers of the depositary bank doubtless wanted to secure. The property deposited was receipted for by the cashier and his assistant, and the whole affair was rather loosely managed. There was no evidence showing that the bank, into whose vaults the property came, habitually received such special deposits without reward, or had ever so received, save possibly, in one other instance, under exceptional circumstances; nor was proof offered that the directors had ever sanctioned or known of this deposit.

We must not unfairly conclude, therefore, that — waiving *ultra vires* and the question of fundamental authority under the charter — knowledge, and consent of the directors or management to the executive officer's receipt of personal property, under a bailment for the bailor's sole benefit, is inferable from a practice which has received their silent sanction, as well as under their particular and express delegation of authority. None of these decided cases, except it be in *dicta*, appears to contradict such a general assertion. And, *vice versa*, that a bank is not liable for a special gratuitous deposit, accepted by its cashier or teller, where the directors or management are not shown to have given express permission, and their knowledge and approval of such a practice cannot be justly inferred, receives support in Pennsylvania as well as New York. See *Lloyd v. West Branch Bank*, 15 Penn. St. 172. National banks are pronounced liable for damages occasioned by the loss through gross negligence of a special deposit made with the knowledge and acquiescence of the president and directors, though without reward. *National Bank v. Graham*, 100 U. S. 694; *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

¹ See Part IV., c. 2, *post*; *Safe Deposit Co. v. Pollock*, 85 Penn. St. 391.

suitable for delivery may serve to evidence the title. The bailment may be, too, either of a bare thing, or of property contained in some receptacle.¹

§ 32. **Delivery or Holding Possession an Essential.** — Delivery, the key-word of bailment law, has in the present connection no ambiguous meaning. It is not the transfer of a title, of ownership, but the transfer of a possession, with its accompanying temporary rights, which is here regarded; and hence, in incorporeal personalty, any assignment or indorsement of what was given into the bailee's hands must be secondary to delivery of the instrument itself, which, worthless or valuable, continues the thing that is to be accounted for under the trust; since every bailment is necessarily of corporeal chattels, or else of the corporeal evidence of incorporeal money rights, or, it may be, of both together; and since, too, the bailment of a chose utterly incorporeal and unevidenced is practically impossible. Delivery of possession should here be made and accepted with the intent of creating a bailment for the bailor's sole benefit. And this delivery and acceptance once completed, the mutual rights and liabilities of the parties under the particular bailment become at once fixed; for the bailor's surrender of possession upon the faith of the bailee's undertaking furnishes a contract consideration sufficient to support even a gratuitous bailment.² What the number, amount, or quantity thus placed in the bailee's charge, and what passes as accessorial to the principal thing, must depend upon the mutual intention of the parties as chiefly manifested in the circumstances attending delivery.³ There may arise a constructive delivery, as where the thing was already in the bailee's possession for some different purpose; or, in certain instances, the taking rather than

¹ Story Bailm. §§ 51, 141; *Coggs v. Bernard*, 2 Ld. Raym. 909; *supra*, § 9.

² *Supra*, § 9; *Mariner v. Smith*, 5 Heisk. 203; *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278.

³ See Story Bailm. § 54; *Pothier Traité de Dépôt*, n. 44.

receiving a thing as bailee ; but actual or constructive acceptance is indispensable, or at least a holding in bailment.¹

§ 33. **The same Subject ; Privity between the Parties.** — The thing bailed need not have been actually delivered to the bailee personally, provided only it were given to his agent or servant duly empowered.² A similar doctrine may be alleged of the officers and employes of a corporation.³

Nor is it indispensable that the bailor who delivers should be owner of the thing delivered ; for privity between the bailment parties sufficiently appears where the bailor has the right to bestow or withhold its possession, or, in other words, has himself a special property in the thing.⁴ Even if his possession were wholly without right, the bailment would yet take full effect, subject to adverse claims of the proper parties made upon the bailee, provided the latter received the thing in good faith and without intending to participate in the wrong.⁵

§ 34. **Whether mere Contract for Bailment is Actionable.** — Inasmuch as a bailment for the bailor's sole benefit is wholly without consideration until the bailor has parted possession, thereby suffering disadvantage on the faith of the bailee's undertaking, our common law, whose policy is to keep men's wits sharpened, refuses earlier to hold the bailee to his undertaking. Hence, the line it draws between non-feasance and misfeasance in such cases ; whereby the gratuitous bailee can be pursued for badly performing the trust he has undertaken, but not for failing altogether to accept the thing and perform according to his naked promise. If I, for instance,

¹ Story Bailm. § 55.

² Lloyd v. Barden, 3 Strobb. 343 ; *supra*, § 30.

³ Parker, C. J., in Foster v. Essex Bank, 17 Mass. 479, 497.

⁴ Armory v. Delamirie, 1 Str. 505 ; Rooth v. Wilson, 1 B. & Ald. 59 ;

⁵ 2 Kent Com. 566 ; Story Bailm. § 52 ; *supra*, § 22.

⁶ *Ib.* ; Taylor v. Plumer, 3 M. & S. 562. As between bailor and bailee the bailment should be respected, even though the former be not full owner of the thing bailed. Tancil v. Seaton, 28 Gratt. 601.

agree to convey A.'s valise to town without recompense, and so receive it, I am not justified in dropping or negligently handling it; but I may refuse to receive it, and break my word with impunity. Some writers of repute have regretted the legal distinction; and Sir William Jones maintains that the Roman code enforced the rule of honor with more exactness by permitting an action for damages to be brought against the non-performing mandatary. Two highly important modern cases seem to establish the common-law doctrine both for England and America, even where the intended bailor's over-confidence in the intended bailee's word has put him to special damage;¹ a conclusion which Judge Story accepts not without reluctance, and some apprehension lest the just application of this doctrine be found inconvenient.² Unquestionably, if the gratuitous bailor must himself suffer wherever special damage is occasioned through his bailee's non-acceptance, it behooves him to guard carefully against the contingency of a broken promise.

This same legal distinction, we may add, is found widely applied in common-law agencies and commissions generally,³ where the suggestion is sometimes made, not unworthy of a

¹ *Thorne v. Deas*, 4 Johns. 84; *Elsee v. Gatward*, 5 T. R. 143. See 2 Kent Com. 570; *Jones Bailm.* 57, 120; *Story Bailm.* §§ 164-172; *Samuels v. McDonald*, 11 Abb. N. Y. Pr. n. s. 344.

² *Story Bailm.* §§ 166, 167, 171 *a*.

³ See *Balfe v. West*, 13 C. B. 466; *Ferguson v. Porter*, 3 Fla. 27; *Fellowes v. Gordon*, 8 B. Mon. 415; *McGee v. Bast*, 6 J. J. Marsh. 455. *French v. Reed*, 6 Binn. 308, is a case relating to the execution of a gratuitous commission (not falling within the strict range of our present subject), where one was held liable under circumstances which rendered it difficult to tell whether the commission had been actually undertaken or not. But in *Balfe v. West*, 13 C. B. 466, a person had gratuitously accepted the post of steward of a horse-race; and it was held that he could not be held responsible for a loss occasioned by his mere non-feasance in omitting to appoint a judge. Says Jervis, C. J. : "The mere acceptance of the office, nothing appearing to have been done, cannot, upon the authorities, make the defendant liable." *Ib.* 473. Cf. *Wilkinson v. Coverdale*, 1 Esp. 75. And see *Smith Merc. Law*, 4th ed. 112.

place in our present connection, that the unremunerated agent who enters upon the business has prevented the employment of one better qualified,—a detriment to his principal which ought sufficiently to uphold his undertaking to perform with care and fidelity.¹

§ 35. **Accomplishment of Bailment Purpose; Standard of Care and Diligence.**—II. Accomplishment of the Bailment Purpose. Bailments for the bailor's sole benefit impose mutual rights and responsibilities; which, however, are best studied with primary reference to the bailee alone, who plays the conspicuous part in the transaction.

And first, as concerns the measure of care and diligence which the gratuitous bailee ought to bestow upon the performance of his undertaking. Only the lowest degree is requisite; in other words, he must use slight care and diligence, according to the circumstances, and he cannot be held answerable for loss or injury, unless grossly negligent.²

This statement of the rule, though strongly buttressed upon authority, fails at this day of universal approval in our jurisprudence. Admitting the policy of dealing leniently with bailees of our present class, some courts have sought a test of diligence more philosophical. "Slight," "ordinary," and "great" are terms they wish to see discarded; and they prefer judging of each case by its own complexion. Hence the announcement we sometimes meet, that the undertaking of the unrecompensed bailee is to accomplish the bailment purpose as carefully or carelessly as the mutual understanding contemplated; this understanding, so far as it failed of explicitness, to be explained by the attendant facts and circum-

¹ Balfe v. West, *supra*. As to the distinction between bailment and contract for a bailment, see *supra*, § 21; *post*, Part IV. c. 1.

² Giblin v. McMullen, L. R. 2 P. C. 336; Spooner v. Mattoon, 40 Vt. 300; Tompkins v. Saltmarsh, 14 S. & R. 275; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Gullede v. Howard, 23 Ark. 61; Griffith v. Zipperwick, 28 Ohio St 388; McKay v. Hamblin, 40 Miss. 472; Scott v. Nat. Bank of Chester Valley, 72 Penn. St. 471; *supra*, § 15.

stances of the particular case.¹ It follows that any neglect of the fairly understood terms of the contract renders the bailee liable for injurious consequences, whether stigmatized as gross negligence or simply negligence.² Nevertheless, slight diligence remains, in our practice, the most approved test of bailments like these. No special contract terms can override public policy in such cases.³ And, indeed, to submit such cases to the touchstone of mutual understanding enhances the risk of capricious verdicts, exposing more especially the party who, in undertaking to perform an act of pure kindness, has failed to perform it with entire success. For the evidence of mutual understanding in bailments like these is rarely positive; we may well ascertain whether recompense was or was not to be claimed; and yet rarely would the gratuitous bailee indicate to what extent he meant to render himself liable, or his bailor do more than express a personal confidence in his fidelity and discretion. Human experience justifies, in this state of things, the assumption that the bailee means to act in good faith, but not with as strict advertence as though he had been hired to perform the transaction, and that the bailor assents to run a greater personal risk because the accommodation is to cost him nothing. Once more, then, mutual silence and the want of an express understanding necessitate a reference to general tests, and we invoke the old standard of "slight," "ordinary," "great;" understanding, of course, that "slight diligence" or "gross negligence" is only a relative term; the same transaction, with benefit to one party or to the other, or to both reciprocally, furnishing to the mind our three different degrees of comparison.⁴

¹ Freeman, J., in *Mariner v. Smith*, 5 Heisk. 203.

² *Ib.* ³ *Supra*, § 20.

⁴ A glance at the latest bailment cases under the present head will show, not only that the above standard of relative diligence is still constantly applied, but that the courts speak of gross or great negligence in this connection. Cf. § 16, *supra*, with the following cases: *National Bank v. Graham*, 100 U. S. 699, 704; *Whitney v. Brattleboro Bank*, 55 Vt. 154;

Such an analysis may here serve to direct attention to the bailor as the party upon whom, if the trust be for his sole benefit, rests a peculiar responsibility as to choosing his bailee fitly. He ought to scrutinize with vigilance the bailee of his own selection; noting, according to his opportunities, the habits, character, skill, and experience of such a person, in short, his general fitness for the trust to be reposed in him. If no bailee without reward can be lawfully required to bestow the average pains upon his undertaking, unless expressly agreeing so to do, still less ought the bailor under such circumstances to expect an unskilful man to perform skilfully, or that his goods will rest safely in a place of whose security he is enabled to judge for himself.¹ Considerations like these are not inapplicable to bailments for mutual recompense; and in bailments for the bailor's sole recompense they bear with all the greater force.²

§ 36. **The same Subject; same Diligence as to One's Own considered.**—Another criterion for bailments of the present class is sometimes stated to be that the bailee shall exercise the same diligence towards the chattel bailed to him that he exercises towards his own.³ This, which has been most fre-

Carrington v. Ficklin, 32 Gratt. 670; *Bronnenburg v. Charman*, 80 Ind. 475; 90 N. C. 493; 112 Mass. 455; *Smith v. First Nat. Bank*, 99 Mass. 605. "Gross negligence" is of course a relative term, suggesting a greater want of care than the average. See Mr. Justice Davis in 91 U. S. 494 (not a bailment case).

¹ See *Beauchamp v. Powley*, 1 Moo. & R. 38; *Stanton v. Bell*, 2 Hawks, 145; *Smith v. Meegan*, 22 Mo. 150; *Searle v. Laverick*, L. R. 9 Q. B. 122.

² 2 Kent Com. 562 and *n.*; *Knowles v. Atlantic R.*, 38 Me. 55; *Griffith v. Zipperwick*, 28 Ohio St. 388; *Story Bailm.* § 74; *McKay v. Hamblin*, 40 Miss. 472.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 914, per Holt, C. J.; *Foster v. Essex Bank*, 17 Mass. 479, 499; *Gibbon v. Paynton*, 4 Burr. 2298; *Jones Bailm.* 122; 2 Kent Com. 562; *Pothier de Dépôt*, n. 23, 27. *Doorman v. Jenkins*, 2 Ad. & E. 256, is a direct authority against such a criterion; the gratuitous bailee here proving equally careless of his bailor's money and his own. And so too is *Tracy v. Wood*, 3 Mason, 132. In *Whitney*

quently asserted of gratuitous deposits, affords rather a presumption than a test, as Judge Story has well shown. For, wherever the bailee is bound to slight diligence, our standard of diligence (subject to the permitted qualifications by contract) is to be taken with reference to that degree of diligence which persons of less than common prudence, so long as they can be called prudent at all, bestow on their own property,¹ or manifest, under like circumstances. Diligence less than the average may yet, we apprehend, be termed diligence. Now, if the diligence bestowed on one's own chattels were the criterion here applied to the care of another's, it would follow that gross neglect in the one case would justify gross neglect in the other; and thus a bank of good reputation, plundered of its own treasure because of some culpably loose practice pursued by its managers, but unknown to customers, would thereby be excused from making good a special gratuitous deposit likewise made away with. But this would be an unreasonable rule. Knowledge on the bailor's part of his bailee's reputed habits, means of performance, and general character should induce, indeed, a just expectation as to how the trust will be performed; but the real point is, not how have other bailments turned out, but how does this particular one; for a man of good general reputation may come to be guilty of a particular sin, or chargeable with a particular imprudence. Doubtless, as Lord Holt has observed, if the bailee is an idle, careless, drunken fellow, and comes home drunk and leaves all his doors open, so that the bailor's goods are stolen with his own, it was the bailor's own folly to trust such an idle fellow.² But suppose, on the other hand, the bailee was a man habitually discreet and sober and of good reputa-

v. Brattleboro Bank, 55 Vt. 154, the decision is right, but the opinion of the court is loosely expressed as to the criterion of responsibility.

¹ *Story Bailm.* §§ 64, 183; *Doorman v. Jenkins*, 1 Ad. & El. 256; And see *The William*, 6 C. Rob. 316; *First Nat. Bank v. Graham*, 79 Penn. St. 106, 118, *Giblin v. McMullen*, L. R. 2 P. C. 317, 339.

² *Coggs v. Bernard*, 2 Ld. Raym. 909, 914.

tion, who on this particular occasion came home drunk and left all his doors open, would the bailor have to bear reproach and take his own share in the loss? Another consideration, sometimes alluded to, which bears against such a test, is, that one may with respect to his own property choose deliberately to encounter extra risks such as he cannot justifiably as regards that of which he is only bailee.¹ But, as a presumption, the maxim is of much service.

It has been ruled that, if the bailor knows the bailee's habits and the place and manner in which the goods are to be kept, the law presumes his assent that his goods shall be so treated.² And Lord Holt, to be sure, has said that if our present bailee "keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them." Yet he adds, as a reason, "For the keeping of them as he keeps his own is an argument of his honesty;"³ indicating, what we may readily admit, that to keep as one keeps his own is almost conclusive of that good faith which is essential to all bailments, however it be as to the bailee's diligence.⁴

§ 37. **The same Subject; Circumstances, etc., should be considered.**—Abstract diligence is not to be contemplated apart from the circumstances present in the case. The nature and

¹ Sir Wm Scott, in *The William*, 6 C. Rob. 316.

² *Knowles v. Atlantic R.*, 38 Me. 55. See *Story Bailm.* § 79.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 914.

⁴ See *Dig.* 16, 3, 32; 2 *Kent Com.* 561 *n.* Might not the maxim run rather that our gratuitous bailee need bestow no greater diligence than he has been wont to bestow on his own property under like circumstances? This would closely approximate a rational test for bailments of the present class. But, whether understood in the sense of the wonted care or the eventual care bestowed upon one's own, such a presumption of slight diligence may be overcome on suitable proof of the facts. *Story Bailm.* §§ 79, 183; *Rooth v. Wilson*, 1 B. & Ald. 59; *Tracy v. Wood*, 1 Mason, 132; *Kettle v. Broomsall*, Willes, 121; *Shiells v. Blackburne*, 1 H. Bl. 158. It is a suspicious circumstance that one claims, in a common exposure, to have lost the bailed property, but saved his own. *Bland v. Womack*, 2 *Murph.* 373; 2 *Kent Com.* 564.

quality of the thing bailed, as well as the reputed habits and character of the bailee, are material to the issue. A plough might be kept in an open shed ; but money and valuable securities received on deposit ought to be fastened up. The temptation the thing offers to thieves, and intrinsic qualities such as render it liable to ruin through exposure, must be considered. So, too, should local usage ; for in the city precautions are requisite such as farmers do not observe in the country.¹ Trade, too, and business, have their varying rules.² Considerations like these may not control ; but they operate in absence of controlling stipulations as part of the mutual understanding or expectation naturally generated of the bailment, and help towards ascertaining whether, in point of fact and under all the circumstances, our bailee's conduct came up to the mark of slight diligence. What the parties mutually understood or had a right to infer upon all the facts, is the conclusion to which all tests of duty refer.³

§ 38. **The same Subject ; whether Skilful Performance is required.**—A gratuitous bailment can rarely demand what, in the abstract, is termed skilful performance, and yet the bailee's responsibility in class pursuits should be tested by class rather than individual comparison ;⁴ and where the exercise of one's profession implies skill, the want of skill may be imputed as gross negligence.⁵

¹ *Batson v. Donovan*, 4 B. & Ald. 21 ; 2 Kent Com. 561 ; *Story Bailm.* §§ 12-15, 186 ; *Griffith v. Zipperwick*, 28 Ohio St. 388.

² *Ib.*

³ See § 51, *post*, as to special contract modifying performance.

⁴ See *First Nat. Bank v. Graham*, 79 Penn. St. 106.

⁵ *Stanton v. Bell*, 2 Hawks, 145. See *post*, as to the skill requisite where the bailment was for mutual benefit. In the present bailment, confidence is mainly reposed in the bailee personally. Chancellor Kent goes so far as to say that " if the depositary be an intelligent, sharp, careful man, in respect to his own affairs, and the thing intrusted to him be lost by a slight neglect on his part, the better opinion would seem to be, that he then is responsible." But this appears too strong a statement as respects a gratuitous depositary.

§ 39. **Honesty and Good Faith requisite.** — Fraud and bad faith are inexcusable in any bailee; and the civil and common law agree that, for damage thereby occasioned, even bailees without recompense are accountable.¹ Gross negligence does not necessarily involve fraud, though sometimes presumptive of fraud, and always culpable.

§ 40. **Liability of Bailee illustrated.** — As was the duty, so, conversely, must be the liability for loss or injury occasioned by the breach of it. A brief examination of the leading English and American decisions (which are not many) under the present head, may serve to show that our standard, though variable, is not capricious.

In the list of cases where the bailee without recompense was held responsible for loss or injury, *Coggs v. Bernard* stands first. Here one who was not by profession a common carrier, and was to have nothing for his service, undertook to carry several hogsheads of brandy from one cellar to another; he did the work so badly as to break one of the casks and spill its contents; and for this loss he was adjudged liable.² Again, Lord Ellenborough, in 1817, pronounced the gratuitous bailee of another's horse liable for turning the animal, after dark, into an unused and dangerous pasture, to which it was unaccustomed, whereby the animal received hurt.³ Still later, a verdict was allowed to stand against a bailee who, receiving in custody, without reward, another's money, put it into his cash-box and kept the box in a tap-room with a bar in it, which was open on Sunday; in consequence of which act of imprudence, not to say of law-breaking, the box was stolen with all its contents.⁴

¹ *Supra*, § 17; Gaius III. § 207; Inst. 3, 15, 3; 2 Kent Com. 563.

Under the Louisiana Code, every depositary without reward is liable for his gross negligence or fraud. *Dunn v. Branner*, 13 La. Ann. 452.

² *Coggs v. Bernard*, 2 Ld. Raym. 909; *supra*, § 10.

³ *Rooth v. Wilson*, 1 B. & Ald. 59. But cf. *Fortune v. Harris*, 6 Jones (N. C.), 532.

⁴ *Doorman v. Jenkins*, 2 Ad. & E. 256 (1834). And see *Whitehead v.*

On the principles we have discussed, too, it is repeatedly decided that a bank which receives, though without recompense, a note for collection, is liable, if neglecting to make presentment in due season to charge an indorser;¹ and that due diligence must be used, so far as the undertaking continues, to collect that note.² Gross negligence, also, in the delivery of a letter or package, has rendered the free messenger thereof chargeable with the injurious consequences.³ So has the careless and unauthorized transmission of property; as where money is sent through the mail without authority or precaution.⁴ Likewise has the sub-employment, by the bailee, of suspicious and irresponsible persons to carry out his undertaking, or his parting with the property to such persons;⁵ and even the needless exposure of the thing bailed under such circumstances as tempt men to steal.⁶

§ 41. **Non-Liability of Bailee illustrated.**— But in many of the decided cases, the circumstances have been deemed such as to acquit the gratuitous bailee of blame for the loss or injury. In *Shiells v. Blackburne*, which is an extreme in-

Greetham, 2 Bing. 464; *Dartnall v. Howard*, 4 B. & C. 345; *Shillibeer v. Glyn*, 2 M. & W. 145. And see 14 Mo. App. 518.

¹ *Bank of Utica v. Smedes*, 3 Cow. 662; *Bank of Utica v. M'Kinster*, 11 Wend. 473; *Durnford v. Patterson*, 11 Martin, 460.

² *Robinson v. Threadgill*, 13 Ired. 39. See *Whitney v. Lee*, 8 Met. 91.

³ *Beardslee v. Richardson*, 11 Wend. 25.

⁴ *Stewart v. Frazier*, 5 Ala. 114; *Ferguson v. Porter*, 3 Fla. 27; *Jenkins v. Bacon*, 111 Mass. 373.

⁵ *Skelley v. Kahn*, 17 Ill. 170.

⁶ *Colyar v. Taylor*, 1 Cold. 372. And see *Beauchamp v. Powley*, 1 M. & R. 38. An interesting case, tried in 1822, before Judge Story, affords a good illustration of gross negligence under circumstances less likely to arise in these later days of express facilities. A broker, who was to take the steamboat from New York to Providence, was intrusted with two bags of gold doubloons, worth upwards of five thousand dollars. He put the bags in his valise, which contained money of his own. He indiscreetly let others on board know that the contents were valuable, and then carelessly exposed his valise in the cabin, where it was plundered, first of one bag and afterwards of the other. The jury found a verdict of gross negligence in the loss of one of the bags. *Tracy v. Wood*, 3 Mason, 132.

stance in point, one merchant, upon request, had undertaken to enter a parcel of goods for another at the custom-house with his own of the same kind, and all the goods were seized because he entered them under a wrong denomination. That the merchant exercised the same skill towards his friend's property as his own, was a strong circumstance in his favor; and the court relieved him as one whose situation, unlike that of a broker, implies no expert knowledge of custom-house routine.¹ In one of our Western States, a peculiar course of transmitting moneys, at a place where there was no banker, was approved, which had been pursued in accordance with local usage.² And under special circumstances the gratuitous bailee has been exonerated where he intrusted another with the affair, so long as the course taken was reasonably prudent.³ So where one collects rents without any reward, slight diligence in the care of what is collected will suffice.⁴ And in keeping or carrying property to oblige another the same standard applies.⁵

¹ *Shiells v. Blackburne*, 1 H. Bl. 153.

² *Eddy v. Livingston*, 35 Mo. 487. See also *Montgomery v. Evans*, 8 Ga. 178; *Goodenow v. Snyder*, 3 Iowa, 599.

³ *Fulton v. Alexander*, 21 Tex. 148; *Kirtland v. Montgomery*, 1 Swan, 452. A merely special depositary is not, before default, liable for the depreciation of bank bills or other securities left in his hands. *Bérard v. Boagni*, 30 La. Ann. 1125.

⁴ *Bronnenburg v. Charman*, 80 Ind. 475. For other examples, see *Elbridge v. Hill*, 97 U. S. 92; 6 Wall. 420; *Patterson v. McIver*, 90 N. C. 493; 32 Minn. 105.

⁵ *Schermer v. Neurath*, 54 Md. 491; *Carrington v. Ficklin*, 32 Gratt. 670. Where a merchant received money which he never mingled with his own, but kept separate from his own in a safe, keeping it on call without reward, he was held not liable for its loss by theft. *Caldwell v. Hall*, 60 Miss. 330. And though he had an option to treat the deposit as a loan, these facts showed that he had not exercised the option, but continued a bailee. *Ib.*; *supra*, § 6.

A recent Vermont case showed that a soldier, in the habit of leaving his pocket-book over night with a comrade in a neighboring tent, and calling for it the next morning, failed one morning of his usual appearance; that the comrade, before going on duty, started to carry back the pocket-

§ 42. **Illustrations of Special Deposit in Banks.** — The most interesting cases, however, decided under the present head, relate to the liability of banks for special deposits received without the expectation of reward. And here we are confronted by that new aspect of diligence and negligence which the employment of corporate officials and servants furnishes.

(a) A familiar principle is that, while a servant or agent incurs no personal liability for an engagement made in the course of employment about his master's or principal's business, he, and not his master or principal, becomes bound when the engagement is *sui juris*, or is unsanctioned, unauthorized, and beyond the usual scope of his employment.¹ An important object, then, with such a depositor who has suffered loss, will often be to fasten the liability upon the bank, rather than upon the individual officer with whom he dealt, or from whose carelessness or criminality he had suffered. And here two other familiar principles remain for reference. (b) That while,

book, but, having no pocket large enough to hold it, secreted it between his shirt and vest, holding on it by pressing outside; that on the way his attention was accidentally diverted, and by the time he reached the bailor's tent the pocket-book was missing; that he instituted immediate search for the property, but never found it again. The evidence showed it not unlikely that a stranger, who had passed the bailee on his walk, picked up the pocket-book and appropriated it. On the ground that the bailee appeared to have acted honestly, and with what, under all the circumstances, might be called, at least, slight diligence, the court refused to hold him liable for the loss. Ordinary diligence, we may infer, would have required the bailee to keep his attention fixed upon what he was carrying so loosely; but slight diligence, it was concluded, did not. *Spooner v. Mattoon*, 40 Vt. 300. Whether, by so departing from the intent of the bailment as to undertake carrying the property back instead of waiting for the bailor to call for it, the bailee might not, under some circumstances, have made himself strictly accountable, appears not to have been here considered. But upon the facts, the bailee apparently had to put an end to the bailment before going on duty, or else encounter extreme peril of loss; and he put an end to it in a manner not altogether imprudent, nor contrary to what the bailor might fairly have anticipated would be the case, where he defaulted in calling for it at the appointed time.

¹ Story Agency, §§ 74, 75, 239; 2 Kent Com. 612; Smith Mast. & Serv. 123-126; Schoul. Dom. Rel. §§ 489-491.

for the wrongful acts of a servant or agent, disconnected with his business and the usual scope of his employment, the party may be charged as a wrong-doer, his master or principal shall not be held answerable, unless himself contributing to the wrong, as, for instance, in the manner of employing him. (c) That for negligent performance on the servant's or agent's part, and his misfeasance generally in the course and usual scope of his employment, the master or principal must respond.¹

§ 43. *The same Subject.* — *Foster v. Essex Bank*, a Massachusetts case, decided in 1821, is perhaps the leading American authority in point; presenting, moreover, the remarkable instance of a bank pronounced chargeable, as a bailee, for gross negligence, and yet exonerated, inasmuch as the thing bailed was fraudulently appropriated by its own cashier, who acted without the scope of his employment, in stealing it like any stranger.² In a later case, decided in the same State, where a special deposit had disappeared from bank vaults, it was announced that, in order to charge the bank, a gratuitous bailee, with such loss, gross carelessness on the part of the corporation, in some respect affecting the custody or occasioning the loss, must be shown; and further, that such gross carelessness should be evinced by such circumstances as the want of a suitable place, or of proper precautions taken in guarding the deposit, or, as to those employed by the bank and concerned in the affair, negligence in selecting them or in failing to discharge them after receiving notice of their unfitness.³ In *Giblin v. McMullen*, the English Privy Council

¹ Schoul. Dom. Rel. § 491; *Foster v. Essex Bank*, 17 Mass. 479; Story Agency, §§ 452, 453.

² *Foster v. Essex Bank*, 17 Mass. 479.

³ *Smith v. First Nat. Bank*, 99 Mass. 605, 611, per Wells, J. This appears to be a more accurate and specific statement than that made by Parker, C. J., in *Foster v. Essex Bank*, 17 Mass. 512, before the doctrine of corporate responsibility had been largely unfolded: "The undertaking of banking corporations, with respect to their officers, is that they shall be

recently followed *Foster v. Essex Bank*, under circumstances quite similar. Here the bank management appeared to have used all ordinary and proper precautions against a robbery; the deposited securities were kept in strong rooms, so guarded by day and night that none but bank employé's could have been likely to steal them; and in fact a cashier (in employing whom no culpable carelessness appeared) was again the culprit.¹

Corporate responsibility for the dishonesty of corporate servants will be found amply discussed, still later, in a Pennsylvania case of gratuitous special deposit. A teller stole bonds which the bank had received on such special deposit from a customer; and notwithstanding circumstances, brought to light after the teller had absconded, showed that he had for two years kept false accounts, and had operated in stocks, the court was of opinion that the bank directors had not contributed to the loss by gross negligence. "Nothing," says the court, "short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create."²

But, as with principals generally, the bank here could not have safely disregarded information open or easily accessible evincing the unfitness of the agent or servant for his trust. Knowledge, for instance, that the cashier or teller engages in fraudulent or dishonest practices, that he gambles, lives beyond his evident means, frequents disreputable houses, or carries on outside money operations which his situation and fortune do

skilful and faithful in their employments; they do not warrant their general honesty and uprightness."

¹ *Giblin v. McMullen*, L. R. 2 P. C. 317.

² *Scott v. Nat. Bank of Chester Valley*, 72 Penn. St. 471, 479, per Agnew, C. J. And see *Percy v. Millaudon*, 20 Mart. (La.) 68, and *Bank of United States v. Dunn*, 6 Pet. 51, for a more general discussion of the duties of bank directors; also *National Bank v. Graham*, 100 U. S. 699.

not warrant, ought to put the directors at once on the alert lest they make themselves or the corporation strictly answerable for his misconduct in their employ. Yet, as it is held, a bank officer's private purchase or sale of stocks does not *ipso facto* afford proof of dishonesty;¹ nor is it negligence for the management to let a cashier select, hire, and pay the bank subordinates out of his own salary.²

§ 44. **The same Subject** — Independently of contract, no obligation rests on the bank which receives the special gratuitous deposit to take extraordinary measures for preserving it safely. That the corporate funds and such deposits were guarded with the same vigilance affords presumptive (though not conclusive) proof, not only of good faith, but of the exercise of all the prudence which the depositor had a right to expect.³ Nor is even this necessary, for special contrivances are now used for rendering a bank's most precious treasures burglar-proof; and our depositor who pays nothing cannot demand of right the innermost compartment of the vaults, so long as his property has the benefit of a place reasonably secure.⁴

The absence of slight diligence may here consist in the failure to make and enforce prudent rules, as in setting a watch, or selecting those who shall keep the keys or know the secret of a combination lock; or, again, in baffling the artful devices of those planning a robbery, who in these days employ stratagem more than force. Bonds, accompanied by a list of minute description, and left by a stranger, were given up on demand to another person, also a stranger, who gave the right name and address, and described the property accurately;

¹ Scott v. Nat. Bank of Chester Valley, 72 Penn. St. 471.

² Smith v. First Nat. Bank, 99 Mass. 605.

³ Allen, J., in First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Griffith v. Zipperwick, 28 Ohio St. 388; First Nat. Bank v. Graham, 79 Penn. St. 106. See *supra*, § 36.

⁴ Griffith v. Zipperwick, 28 Ohio St. 388.

but the depositary was not, in a recent instance, excused.¹ And yet the same court refused to charge the voluntary bailee where a robbery was effected by an ingenious device calculated to impose upon careful persons.² Culpable carelessness may appear in failing to take steps to recover the stolen property.³ But the mere fact of loss by robbery does not *per se* establish gross negligence.⁴

§ 45. **Other Illustrations; Finding, Attaching, etc.**—In *quasi* bailments (or those not strictly upon contract) involving no recompense, and where the possession is not wrongful, as in the instance of a finder, the bailee is chargeable for gross negligence and fraud as in the other cases we have enumerated.⁵

¹ Lancaster Co. Bank v. Smith, 62 Penn. St. 47. And see Ganley v. Troy City Bank, 98 N. Y. 487.

² De Haven v. Kensington Nat. Bank, 81 Penn. St. 91. See, further, First Nat. Bank v. Graham, 79 Penn. St. 106; s. c. 85 Penn. St. 91; Mariner v. Smith, 5 Heisk. 203; Maury v. Coyle, 34 Md. 235; Dearborn v. Union Nat. Bank, 61 Me. 369.

It should be observed that, in a number of these gratuitous depositary cases, the rule loosely laid down by the court has been such as would exact "ordinary care" of the bailee, or that measure of diligence which belongs to a bailment for mutual benefit. See Maury v. Coyle, 34 Md. 235, 247; Lord Cheimsford in Giblin v. McMullen, L. R. 2 P. C. 317. And see Lancaster Co. Bank v. Smith, 62 Penn. St. 47. But unless a bank is to derive some sort of advantage from thus acting as a depositary (which might be the case independently of a money recompense), this, we submit, is placing the standard too high. In First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278, 295, Allen, J., observes, with more caution, that the depositor can only claim of the gratuitous depositary that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department. And Wells, J., in Smith v. First Nat. Bank, 99 Mass. 605, says quite correctly, that there must appear "gross carelessness" on the part of the bank to render it chargeable. See also Mr. Justice Swayne in National Bank v. Graham, 100 U. S. 699, 704, to the effect that the special deposit may arise either on a contract of hiring or without reward, and that the bank would be liable "for a greater or less degree of negligence accordingly."

³ Wylie v. Northampton Bank, 119 U. S. 361.

⁴ *Ib.*; *supra*, § 23. See also Whitney v. Brattleboro Bank, 55 Vt. 151.

⁵ Story Bailm. §§ 85-87; Isaack v. Clarke, 2 Bulst. 306; Doct. & S. Dial. 2, c. 38; Drake v. Short, 4 Esp. 165; Bobo v. Patton, 6 Heisk. 172.

Some early authorities, which convey a different impression, are in error.¹ Of the *quasi* bailments under judicial process the same may be affirmed, though the bailee, if specially recompensed for the service, ought to exert a higher degree of diligence. An attaching officer is responsible to the usual extent for the goods he takes into possession, whether the loss happen through his personal default or that of the deputy or keeper he employs.² The responsibility ought in these cases to be the more positive, inasmuch as the bailor or owner gives no assent, and can exercise no control over the arrangements.³

§ 46. **Liability as concerns Skilled Performance.** — While discussing the liability of mandataries, Sir William Jones follows Ulpian in distinguishing the mandate to carry goods from that of doing work upon them; and, while expressing no decided opinion of his own, he intimates that bailees of the former class are liable only for their negligence or bad faith, while those of the latter must use a degree of diligence and attention adequate to the performance of the undertaking.⁴ There appears no reason in such a distinction, nor do common-law authorities support it, but rather the reverse.⁵ Whether it be to carry, or to perform work, or merely to hold the thing in custody, a slight degree only of diligence is exacted of the gratuitous bailee; which diligence, so far as the bailee's known character, qualifications, and means of per-

¹ Bac. Abr. Bailment, D.; Owen, 141; Cro. Eliz. 219; 1 Leon. 224. See criticism by Story, J., in Story Bailm. §§ 85-87.

² Ames, J., in Parrott v. Dearborn, 104 Mass. 104; Blake v. Kimball, 106 Mass. 115; Story Bailm. § 130.

³ In Job v. Job, 6 Ch. D. 562, the court observes somewhat carelessly, *obiter*, that an executor or administrator (whose service in England is deemed gratuitous) is chargeable as a bailee without reward only for loss of goods by his "wilful default." We presume such a party could not claim immunity from a loss occasioned by his gross negligence.

⁴ Jones Bailm. 53, 62, 120.

⁵ Story Bailm. §§ 175-182. Whether the civilians meant to make such a distinction, *qu.* Ib., § 177.

formance have entered into the case, must sink or rise, whatever the purpose to be accomplished. The undertaking of a skilled workman towards a piano, or of a professed piano mover, is different from that of a job carpenter or a common carter. Bankers have the better facilities for keeping money and valuables; agistors, for keeping cattle. And while the bailments we now consider are frequently to unskilful and unprofessional persons, and not in the line of a business vocation, the legal estimate of diligence requires us often to average men by their vocations, and to admit questions of skill accordingly.¹

§ 47. **Inevitable Accident, etc., excuses.** — Since even bailees for recompense are excused where losses occur through inevitable accident, as by lightning, shipwreck, or sudden death, or because of irresistible human force, such as the invasion of an army, highway robbery, or piracy, unquestionably so are bailees without recompense.² And where such bailee is deprived of the thing under stress of the law, gross negligence cannot be imputed against him;³ nor could it if the thing perished by accidental fire,⁴ or was stolen from the bailee without his fault.⁵ But in all such cases we assume that the bailee did not bring on the loss or injury or fail to forfend the consequences by his own culpable carelessness or bad faith.

§ 48. **Liability for Contents of Closed Receptacle.** — It is sometimes asked how far the gratuitous bailee of a closed receptacle should be held liable for its contents. This depends somewhat upon his means of knowing such contents. In general, the liability should be according to what the bailee had

¹ See 2 Kent Com. 571; *Shiells v. Blackburne*, 1 H. Bl. 158; *First Nat. Bank v. Graham*, 79 Penn. St. 106.

² *Lampley v. Scott*, 24 Miss. 528; *Colyar v. Taylor*, 1 Cold. 372; *Levy v. Bergeron*, 20 La. Ann. 290.

³ *Biddle v. Bond*, 34 L. J. Q. B. 137; *Edson v. Weston*, 7 Cow. 278.

⁴ *Hobson v. Woolfolk*, 23 La. Ann. 384.

⁵ *Danville Bank v. Waddill*, 31 Gratt. 469; §§ 43, 44, *supra*.

reason to believe the package contained; and a bailment of the present class fairly requires that the bailor should by word or sign apprise the other of the contents sufficiently to enable him to handle and bestow care upon the whole thing as its nature requires.¹ But, if full power were given the bailee to examine the contents, — as where the bailor hands over his box of gold with the key and a schedule of the contents for the bailee to verify, — the bailee becomes chargeable for receptacle and contents together, according to their real nature and worth. And while, under most circumstances, the bailee is not justified in opening the receptacle while accomplishing his undertaking, even though he act in perfect good faith, he might, in some pressing emergency, such as a fire, do so on his bailor's behalf, separating the receptacle from its contents, or the less from the more valuable.²

§ 49. **General Conclusion as to Bailee's Liability.** — On the whole, it may be concluded that, wherever a bailee undertakes without recompense to accomplish towards a chattel the bailment purpose, and has actually entered upon the performance of such undertaking, he is bound to bestow a degree of diligence less than what the average of mankind under the same conditions are wont to exert with reference to their own property,³ and yet enough to be deemed slight diligence; that he renders himself liable correspondingly for the ill consequences of what the law terms gross negligence, or negligence of a deeper dye than the ordinary, in executing his undertaking; and that for fraud and bad faith in the performance he becomes, as a matter of course, liable. As to what constitutes slight diligence or gross negligence, this depends in each case upon a variety of circumstances, such as the occupation,

¹ Story Bailm. §§ 75-78; Jones Bailm. 37; Bonion's Case, Year Book, 8 Edw. 2; 2 Ld. Raym. 914; 2 Kent Com. 561. The Roman lawyers appear to have bestowed much pains upon this point, without reaching very plain conclusions. See Jones Bailm. 37-41, and authorities cited.

² *Ib.*

³ Or similar property, *semble*.

means and method of performance, habits, skill, and general character of the bailee, as fairly brought home to the bailor, local custom and business usage, and the nature, quality, and value of the chattel bailed; so much so, in fact, that often a bailment of the present class might almost seem a personal trust. Whether the gratuitous bailment be by way of "deposit" or "mandate" (as some have classified), the general rule is the same, only that some undertakings contemplate more activity and some less. And since our standard is to be adjusted in each case by the special circumstances presented, so as to get at the full import and mutual intent of the bailment, a modifying element lurks in the express agreement of the parties; of which more presently.

§ 50. **Practice in such Suits.** — In the main, gross negligence is a question of fact upon all the evidence for a jury; but the court should make leading principles clear, and direct the minds of the jury to the criterion of responsibility.¹ Independent acts of the bailee which have nothing to do with accomplishing the particular bailment purpose are not admissible.² And yet, as part of the *res gestæ*, the bailee's conduct upon ascertaining the loss might often be material to the issue of due diligence; as where upon discovering the loss he failed to give prompt notice or to set measures on foot for regaining possession,³ though a silent pursuit is sometimes the more

¹ See *Giblin v. McMullen*, L. R. 2 P. C. 317, 335, per Lord Chelmsford; *Ryder v. Wombwell*, L. R. 4 Ex. 32; *Whitney v. Lee*, 8 Met. 91. 93; *Smith v. First Nat. Bank*, 99 Mass. 605; *Griffith v. Zipperwick*, 28 Ohio St. 388. Cf. *Doorman v. Jenkins*, 2 Ad. & E. 256; *Story Bailm.* § 62 *n.* And see *Fulton v. Alexander*, 21 Tex. 148; *Lobenstein v. Pritchett*, 8 Kans. 213; *Skelley v. Kahn*, 17 Ill. 170; *Gulledge v. Howard*, 23 Ark. 61; *Eddy v. Livingston*, 35 Mo. 487; *Lancaster Co. Bank v. Smith*, 62 Penn. St. 47.

² *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278; *Scott v. Nat. Bank of Chester Valley*, 72 Penn. St. 471. Cf. *Dearborn v. Union Nat. Bank*, 61 Me. 369.

³ See *Tompkins v. Saltmarsh*, 14 S. & R. 275; *McNabb v. Lockhart*, 18 Ga. 495; *Wylie v. Northampton Bank*, 119 U. S. 361.

prudent, and, whichever course the bailor acquiesces in, he must stand to the consequences.¹ Parties to a suit may now, in many States, testify on their behalf; and, independently of legislation, this is sometimes permitted, from the necessities of the case, to the bailee² or the bailor.³ As for the breach itself in bailments under a contract, the injured party may sue *ex delicto* or *ex contractu* at his option.⁴

§ 51. **Special Contract may modify; Public Policy, etc.**—We next consider, how may the manner of accomplishing the bailment purpose be affected by special agreement of the parties. In general, whatever the bailor and bailee have mutually assented to shall operate in this or any other kind of bailment, whether by way of qualifying generally the bailee's responsibility for the thing, or to control the mode of bailment accomplishment in certain particulars. It is this undertow of a mutual understanding, often better felt than perceived, which so often baffles the operation of general principles in the case;⁵ for it is always material to know what the parties expressly intended or were presumed to intend.

But public policy here intervenes, as it does in all other contracts, to put bounds to the right of private arrangement. The universal principle is that the bailee cannot stipulate against responsibility for his own fraud and wilful misconduct.⁶ And it is further held that the bailee without recompense cannot thus procure an absolute immunity from the

¹ First Nat. Bank v. Graham, 79 Penn. St. 106.

For the rule of damages in bailments of this class see Maury v. Coyle, 34 Md. 235; Beyris v. Spor, 22 La. Ann. 16.

² Lampley v. Scott, 24 Miss. 528; 1 Greenl. Evid. § 329.

³ 1 Greenl. Evid. § 348; Herman v. Drinkwater, 1 Greenl. 27.

⁴ 1 Chitt. Pl. 151; 100 U. S. 762.

⁵ See Story Bailm. §§ 80, 182; *supra*, § 20. The contract may involve a bailment with an option to turn the transaction into a sale. 60 Miss. 330; *supra*, § 6.

⁶ Story Bailm. §§ 32, 182; Pothier de Mandat, n. 50.

consequences of his gross negligence,¹ which is so near to fraud that it seems always culpable.

Within these limits, whatever special directions accompanied the bailment delivery should be followed;² and the bailee's special terms of acceptance bind him and his bailor alike.³ Nor appears there any reason why a gratuitous bailee may not enlarge by special agreement the radius of his liability; for, if he be foolish enough to do so, the law will not say that his stipulation was nude pact.⁴ But by no promise of doubtful import ought a bailee without recompense to be so harshly constrained;⁵ and the present inclination of the courts is to construe special expressions so as not to work such parties a special injury.⁶

§ 52. **Other Mutual Duties and Rights; Whether to use or misappropriate.** — Other duties and rights grow out of the

¹ See *post*, Part VI., as to Common Carriers; *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. (N. Y.) 96.

² *Ferguson v. Porter*, 3 Fla. 27; *Stewart v. Frazier*, 5 Ala. 114; *McCauley v. Davidson*, 10 Minn. 418; *Fellowes v. Gordon*, 8 B. Mon. 416.

³ See *Trowbridge v. Schriever*, 5 Daly (N. Y.), 11.

⁴ *Clark v. Gaylord*, 24 Conn. 484.

⁵ *Coggs v. Bernard*, 2 Ld. Raym. 909, 913; *Southcote's Case*, 4 Co. 83 b, 43 Eliz. *Southcote's Case*, if rightly decided, simply gave force to the special undertaking of a gratuitous bailee, to answer for goods even should they be stolen. Lord Coke, in reporting the case, put the point as though a bailment to keep and a bailment to keep safely were the same thing; which, in *Coggs v. Bernard*, was emphatically declared to be bad law. And see *Kettle v. Bromsall*, Willes, 118. But the latest authorities show a decided reluctance to attach to the use of such words of promise as "safely" or "securely," in a bailment undertaking, the forced meaning of a special acceptance, upon more than the legal measure of diligence appropriate to the bailment. *Ross v. Hill*, 2 C. B. 877; *Whitney v. Lee* 8 Met. 91.

⁶ *Ib.* In *Whitney v. Lee*, 8 Met. 91, the court refused to consider a gratuitous bailee's promise to "secure and take care of" a promissory note as importing an undertaking to take active measures to obtain security for it. See also *Treffitz v. Canelli*, L. R. 4 P. C. 277; *Maury v. Coyle*, 34 Md. 235; *Clark v. Gaylord*, 24 Conn. 484; *Wright v. Paine*, 62 Ala. 340.

present bailment relation, which, however, give rise as yet to but little controversy. As for the right of a bailee without recompense to use the thing bailed to him, such a bailment, from its very nature, presupposes that the only use is incidental to securing benefit to the bailor; for, were it otherwise, the bailment would belong to the mutual-benefit class. Whatever use, then, follows the delivery should be viewed, as concerns the bailee, more as a duty than a right, or as an incident rather than an object. By accepting an animal upon bailment, the bailee undertakes to use suitable diligence in feeding, exercising, and, so far as may be, preserving the health of the creature. Horses must be driven out, sheep should be shorn, and cows milked; but a bailment without recompense assumes that such valuable products as milk and wool, together with the profits of teaming, go to the bailor's credit. As to things inanimate, like furniture, useful machines, books, and works of art, the rule corresponds; the nature and quality of the chattel, and the general circumstances of the bailment, suggesting what shall be done by the bailee in furtherance of his trust. To waste, as one might say, the bailor's horse on the bailee's business, appropriate milk from the bailor's cows, thumb over his books, make profit out of his machines, put up his pictures at public exhibition, and the like, could hardly be otherwise than to abuse the bailee's own opportunities, or make the bailment one for recompense. But each case must rest upon its special merits; and there are, no doubt, bailments essentially of the present description, which cannot but carry to the bailee an incidental enjoyment; such as the convenience of using your horse that I am exercising, or the pleasure of looking upon your pictures that hang, for your accommodation, on my walls. For here the bailment subsists with a benefit to the bailee too slight and casual to be deemed a recompense. Beyond this it seems unsafe to say more than that gratuitous bailees do sometimes, availing themselves of opportunity, make an unwarranted use of the thing bailed, but, causing the bailor

no actual harm thereby, suffer no actual reproof. And were the justification set up that the use served as partial recompense for the pains, they would claim in effect to be bound as bailees for mutual benefit.¹ By the Roman law the depositary's use of the thing without his depositor's permission was stigmatized as a breach of trust and criminal.²

For misappropriation of the thing bailed to him, every bailee without reward makes himself strictly answerable. He must not even expose to hazard for the personal gratification of himself or others the thing confided to him; nor put it to different uses from those mutually contemplated; nor, without permission, break open a closed package, unless, perchance, for the bailor's interest in some extreme emergency.³ His attempt to sell, pledge, or give away the thing, or otherwise assume to act as the owner thereof, would be downright dishonesty, and amount to conversion.⁴ It is an argument for the good sense and fidelity of parties thus intrusted that our reports shed but little light on these points.

§ 53. **Right to incur Expense, make Sub-contracts, etc.** — On the other hand, the bailee has, by virtue of his undertaking, a right to incur such expense and make such sub-contracts about the thing as may be needful and proper for accomplishing the true object of the bailment. For the law never presumes that a gratuitous undertaking was designed for burdening the bailee with expense, but requires strict proof to establish it. Hence the bailor becomes commonly bound by his bailee's fair contract for care and preservation of the thing, even though the latter party had contracted on his own account; and so generally as to the bailee's needful disburse-

¹ Jones Bailm. 81, 82; 2 Kent Com. 568; Story Bailm. §§ 89-91, 188; Pothier *Traité de Dépôt*, n. 37.

² Story Bailm. § 91; Inst. 4, 1, 6; Poste Gaius, III., 90, 91.

³ Story Bailm. §§ 92, 188; *Hartop v. Hoare*, 3 Atk. 44; 2 Str. 1187.

⁴ See *King v. Bates*, 57 N. H. 446; *Dale v. Brinckerhoff*, 7 Daly, 45; *post*, § 56.

ments about the thing.¹ And our law, as did that of Rome, favors the policy of fastening all liabilities thus incurred upon the thing itself for the better security of creditors.² Likewise it would appear that the bailee without recompense may properly require his bailor to make good whatever damage he may have directly sustained by performing the undertaking; though the common law on this point is not clear, nor have the civilians admitted the rule without some nice reservations.³ The bailee ought, if possible, to procure his bailor's sanction to expenses.

§ 54. **Rights and Duties as to Third Persons; Special Property, Suits, etc.** — Lastly, as concerns the bailment rights and duties with reference to third persons. Every bailee without reward, precarious and incomplete as may be his title, has an interest sufficiently enabling him to sue tortwise and even to maintain trover, as it is held, against all strangers to the bailment who wrongfully invade his possession;⁴ and this, though he be a mere finder.⁵ For possession is *prima facie* evidence of right, and the party who seeks to dispossess should show a better title;⁶ and besides, the possessor sustains a bailment responsibility to the true owner. That he may sue those in contract privity with him follows, of course.⁷

Authorities are somewhat in conflict as to whether the

¹ Harter v. Blanchard, 64 Barb. 617; Devalcourt v. Dillon, 12 La. Ann. 672; Story Bailm. §§ 121, 154, 197, 198.

² Ib.; 1 Schoul. Pers. Prop. §§ 375-393; 2 Kent Com. 634; 1 Domat B. 1, tit. 7, § 2, art. 1-3; Colquhoun Rom. Civ. Law, § 1745. We assume that the lien creditor acts in good faith.

³ Story Bailm. §§ 200, 201; Pothier Contrat de Mandat, n. 75-77.

— ⁴ 2 Kent Com. 568, 585; 2 Bl. Com. 395, 452; Story Bailm. §§ 94, 133, 150; 2 Saund. 47 a, 47 d; Armory v. Delamirie, 1 Stra. 505; Harrington v. King, 121 Mass. 269.

⁵ Armory v. Delamirie, 1 Stra. 505; Sutton v. Buck, 2 Taunt. 302.

⁶ Ames, J., in Shaw v. Kaler, 106 Mass. 448, pronounces this to be a "sound and incontrovertible principle," applying to actions of trespass, trover, and replevin.

⁷ *Supra*. §§ 22, 53.

bailee without recompense, or, more particularly, the mere depositary, can be said to have a special property in the thing bailed to him. Some contend that trover (which is founded in property, while trespass originates in possession), lies in such a bailee's favor,¹ but Judge Story argues with force that he has no such special property.² The controversy is not of consequence to such of our States as have simplified their practice by bringing civil actions founded in a wrong under one head;³ but in various modern cases the right to sue in trover is upheld.⁴ And while all must admit that bailees in general have no full property right, but at best something we have to designate, for convenience, a "special property" or possessory interest (which, in the case of a gratuitous depositary, must be of the barest sort), it is no less certain that a depositary or any other bailee without recompense has in general the right, whatever the form of action sounding in tort, to sue third parties for injury to or conversion of the thing bailed.⁵ Massachusetts denied the right early in this century, however, to the receiver of chattels attached by an officer of law; in which denial New York followed her,⁶ while

¹ This view is ably maintained by Mr. J. B. Wallace, against Judge Story, in 16 Am. Jur. 280-285 (1837). And see 2 Kent Com. 568 n., 585; 2 Bl. Com. 395, 452; Bennett, J., in *Thayer v. Hutchinson*, 13 Vt. 504, where the subject is discussed with great learning; *Poole v. Symonds*, 1 N. H. 289. And see *Rooth v. Wilson*, 1 B. & Ald. 59; *Miles v. Cattle*, 6 Bing. 743.

² *Story Bailm.* §§ 93, 133, 150, 152; *Hartop v. Hoare*, 3 Atk. 44; 2 Stra. 1187; *Ludden v. Leavitt*, 9 Mass. 104; *Giles v. Grover*, 6 Bligh, 277; *Steamboat Co. v. Atkins*, 22 Penn. St. 522. Judge Story's argument goes the full length of denying to all bailees without recompense a "special property."

³ Mass. Gen. Stats. (1860), c. 129, § 1.

⁴ *Harrington v. King*, 121 Mass. 269.

⁵ *Story Bailm.* §§ 94, 150; 2 Kent Com. 568, 585; other authorities, *supra*.

⁶ *Ludden v. Leavitt*, 9 Mass. 104; *Commonwealth v. Morse*, 14 Mass. 217; *Dillenback v. Jerome*, 7 Cow. 294; *Story Bailm.* § 133. The ground of denial was, that the mere naked possession of the receiver

New Hampshire and Vermont have quite sturdily maintained the opposite doctrine on the theory of the special property, and their rule appears the more reasonable.¹ Under the Roman law, the depositary's right seems to have been thought of so little consequence that only the depositor could bring an action of theft; but this, according to Gaius, was because the depositary could not be held answerable for a loss, but only for fraud.²

But if the bailee without recompense has a right to sue third parties for interfering with his possession, so, too, may the bailor himself. While either of these may gain full redress for the wrong committed, both cannot; he who sues is said to take priority in this respect; and a full recovery of damages by the one bars a similar action by the other.³

§ 55. **Termination of the Bailment; how brought about.** — III. Termination of the bailment. Bailments of the present sort may be terminated in a variety of ways, according to the circumstances; but, in general, either upon full accomplishment of the bailment purpose or its decisive interruption; which interruption may have been by the act of the bailor, or of the bailee, or of both together, or by something external. How far an interruption which involves the unsuccessful accomplishment of the bailment

was too slight to support his action of trover, since property in chattels must be either general or special, and here the attaching officer had the special property in himself. This was, perhaps, no more than, in a peculiar case, to treat the receiptor as practically the officer's servant. And cf. *Shaw v. Kaler*, 106 Mass. 448; *Harrington v. King*, 121 Mass. 269.

¹ *Poole v. Symonds*, 1 N. H. 290; *Hyde v. Noble*, 13 N. H. 494; *Thayer v. Hutchinson*, 13 Vt. 504. Chancellor Kent is evidently of this opinion. 2 Kent Com. 568 *n.* And in *Miller v. Adsit*, 6 Wend. 335, the receiptor of goods taken on execution was in New York allowed to bring replevin against a mere wrong-doer. See *Bangs v. Beacham*, 68 Me. 425, to the effect that a receiptor is the mere bailee of the attaching officer, and must surrender upon his seasonable demand.

² *Poste Gaius*, III., § 207; *Colquhoun Rom. Civ. Law*, § 2068.

³ 2 Kent Com. 585; *Story Bailm.* § 94; *Harrington v. King*, 121 Mass. 269.

purpose may leave the bailee chargeable, already sufficiently appears.

Our present bailment may be held sufficiently accomplished in many cases (and this holds particularly of the gratuitous deposit for a time uncertain) whenever either party sees fit to put an end to it. Upon the bailee who thus terminates the trust rests the duty of giving his bailor due notice and a reasonable opportunity of getting the thing back;¹ and upon the bailor, under corresponding circumstances, that of making a demand, unless, because of his bailee's misappropriation, or for other good reason, such a formality would be nugatory.² But where something precise was to be accomplished, such as carrying the thing to a particular place, or performing a certain work upon it, the bailee cannot divest himself of his trust at pleasure, but, unless released by the bailor, must go on and perform his self-imposed task with at least good faith and slight diligence; and so is it in bailments for custody for a fixed period; since otherwise, the bailee becomes liable in damages as for breach of a contract.

Mutual consent, however, may interrupt so as to terminate the bailment at any time, for such is the general rule of contracts. And thus might some new arrangement be substituted; as where parties to a special deposit of money agree afterwards that the depositary shall pay interest upon it, the effect of which is to turn the special deposit into a general one.³

§ 56. **The same Subject.**—The gratuitous bailee's transfer of the thing committed to his care, as though clothed with the *jus disponendi*, is so wanton a violation of duty as to justify the bailor in treating the bailment as virtually ended, and

¹ Roulston v. McClelland, 2 E. D. Smith (N. Y.), 60.

² West v. Murph, 3 Hill (S. C.), 284; Phelps v. Bostwick, 22 Barb. 214; Montgomery v. Evans, 8 Ga. 178; McLain v. Huffman, 30 Ark. 428; Stewart v. Frazier, 5 Ala. 114; Jackman v. Partridge, 21 Vt. 558.

³ Howard v. Roeben, 33 Cal. 399; Rankin v. Craft, 1 Heisk. 711; Cicalla v. Rossi, 10 Heisk. 67; Chiles v. Garrison, 32 Mo. 475.

bringing trover for repossession.¹ But the bailor might elect to sue upon the bailee's breach instead of pursuing the thing itself; and the bailee's wrongful act will not, of itself, sever the bailment relation to the bailor's detriment. Thus, where a depositary wrongfully sells the deposit, and the depositor, ignorant of his misconduct, does not demand the property for more than six years, the statute of limitations will not begin to run against the bailor's right of action until such demand.²

The bailor's demand, putting a decisive end to the bailment whose limits were not definitely prearranged, obliges the bailee to give up the thing, or else account for it. And in bailments of the present class the bailor's right extends even to the countermand of an order to give the thing to a third party; though, where the bailee has already entered into privity with such third party, the case will be different; nor is the bailee's indemnity to be disregarded.³ Notice, on the other hand, to the bailor, which is the bailee's method of putting an end to his indefinite engagement, is so far effectual, that after it is rightfully given, and the bailor has been allowed opportunity to remove the goods, the bailee may put them off his premises;⁴ though, of course, no notice should be given inconsistent with the suitable performance of one's undertaking.⁵

¹ *King v. Bates*, 57 N. H. 446; *Wilkinson v. Verity*, L. R. 6 C. P. 206; *Cooper v. Willomatt*, 1 C. B. 672; *Crump v. Mitchell*, 34 Miss. 449.

² *Wilkinson v. Verity*, L. R. 6 C. P. 206. Cf. *Crump v. Mitchell*, 34 Miss. 449. And see *McMahon v. Sloan*, 12 Penn. St. 229.

³ *Beardslee v. Richardson*, 11 Wend. 25; *Derrick v. Baker*, 9 Port. 362; *Winkley v. Foye*, 33 N. H. 171; *Story Bailm.* § 104; *Lees v. Dwight*, 10 La. Ann. 711.

⁴ *Roulston v. McClelland*, 2 E. D. Smith (N. Y.), 60.

⁵ If the owner neglects to take the thing away after due notice and opportunity, the gratuitous bailee may place it on storage at the bailor's charge, subject to the risk of being sold by the storekeeper for his own charges. But the bailee cannot sell the property. *Dale v. Brinckerhoff*, 7 Daly (N. Y.), 45.

§ 57. **Redelivery or Delivery over; in what Condition.** — Redelivery, or a delivery over of the thing according to the bailment undertaking, marks the final termination of the bailment. The identical chattel should be delivered up by the bailee in its then existing condition; if bettered, this affords no gain to himself, but, at most, the reimbursement of his outlay; if made worse, it avails nothing unless due to his fraud or gross negligence; if utterly lost or spoiled, he is responsible in damages so far as his bad faith or what the law terms the failure to exercise slight diligence caused the mischief.¹ All profit and increase derived from the thing, such as the offspring of an animal, or the hire-money received from a machine, ought likewise to be delivered up or accounted for.²

§ 58. **Redelivery or Delivery over; to whom; Stakeholder, etc.** — The person to whom delivery ought to be made is ascertainable by reference to the terms and true import of the bailment. Delivery is, under our present head, most commonly a redelivery; but it might be, as the contract or circumstances required, to some third person such as the bailor's transferee.³

A stakeholder, or the bailee, such as a clerk holding money paid into court, or a sheriff with attached goods, who holds under a sort of sequestration, must needs assume a certain responsibility for ascertaining to whom he should ultimately make delivery.⁴ And in various other instances

¹ Story Bailm. §§ 97, 194; Jones Bailm. 36, 46, 120; *Coggs v. Bernard*. 2 Ld. Raym. 909; 2 Kent Com. 567; Pothier de Mandat, n. 58, 59; *supra*. § 35.

² Story Bailm. §§ 99, 194; 2 Kent Com. 567.

³ Story Bailm. § 103.

⁴ See *Mott v. Pettit*, Cox, 298; *State v. Fitzpatrick*, 64 Mo. 185.

The defendant, in case of the dissolution of an attachment, appears *prima facie* the true owner, to be thus regarded by the attaching officer. But the officer must take notice of any rights meantime made known to him of the defendant's vendee, and surrender accordingly. *State v. Fitzpatrick*, *supra*. And see Story Bailm. §§ 128, 132; *Blake v. Kimball*,

discretion must be exercised by the bailee as to the party entitled to receive the thing from him; as where the bailee takes a deposit to be paid over after he has ascertained a certain fact; but the courts are indisposed to extend, by inference, the perils of an unprofitable trust.¹

§ 59. **The same Subject ; Bailor's Agent, Successor, etc. —** Bailment by a servant, as such, is bailment for his master; and redelivery, or delivery over, may be either to a master or to his servant, on the usual principle. But it behooves the bailee not only to regard such revocation of an agency as may have been brought to his attention, but to scrutinize the authority of one who offers himself for the first time as agent at this stage.² Delivery over to one fully authorized will discharge the bailee, even though the latter was not aware that such authority had been conferred.³

In like manner, where one has bailed in a representative capacity, such as an executor or administrator, or a guardian, or a trustee, the bailee should not redeliver regardless of that circumstance; and in case a successor in the trust has been appointed, redelivery should be to him, or, where the trust has expired, as in the instance of a minor ward attaining majority, to the party *sui juris* lawfully entitled.⁴ If, on the other hand, redelivery or delivery over was undertaken with reference to one at the time alive and *sui juris*, his subsequent death or legal incapacity pending accomplishment of the bailment purpose would, on general principles, compel the bailee to deal with the personal representative instead.⁵

106 Mass. 215. A mere receiptor has simply to account to the attaching officer. *Bangs v. Beacham*, 68 Me. 425.

¹ See *Trefftz v. Canelli*, L. R. 4 P. C. 277; *Lafarge v. Morgan*, 11 Mart. 462; *Carle v. Bearce*, 33 Me. 337; *Chase v. Gates*, ib. 363.

² *Bac. Abr. Bailment, D.*; *Story Bailm.* § 106.

³ See *Chattahoochee Nat. Bank v. Schley*, 58 Ga. 369.

⁴ *Story Bailm.* § 109; *Pothier Traité de Dépôt*, n. 50.

⁵ *Story Bailm.* §§ 109, 211. But see § 61.

§ 60. **Delivery over where Adverse Claims of Title are made.**

— But the bailee's situation at the termination of his trust obliges him not unfrequently to go outside his undertaking and choose whether to redeliver by his bailor's title, or by that of some stranger who sets up an adverse claim to the thing. A bailee cannot, in general, dispute his bailor's title, nor set up a third party's rights without authority, nor refuse to perform in accordance with his undertaking; and yet the rightful owner cannot thus be wholly excluded, else every thief might find a safe treasure-house wherever he could persuade an unsuspecting person to become his bailee. In point of fact our bailee must respond to the legal claims of the true owner whenever asserted in season; for, though his actual redelivery or delivery over in accordance with the undertaking in good faith, and without adverse notice, will doubtless clear him,¹ he acts at his peril, if he disregards notice of a claim and of the claimant's intention to enforce it, before parting with possession.² But the bailee is not powerless; since he may refuse delivery and call in the bailor to defend the claimant's suit, or, what is more convenient, interplead bailor and claimant, and leave a court of equity to determine the true title on ample investigation.³ The Louisiana Code declares a depositary bound, in the absence of judicial procedure, to hold the deposit subject to the depositor's order.⁴ But as a universal rule, delivery in fact to the rightful party will exonerate every bailee who holds under a wrongful delivery of possession; and wherever the bailee can show that by legal proceedings, of which his bailor had due notice, or to which he was properly made a party,

¹ *Nelson v. Iverson*, 17 Ala. 216; 34 La. Ann. 1133. See *Brown v. Thayer*, 12 Gray, 1; *Dewey v. Field*, 4 Met. 383; *Dodge v. Meyer*, 61 Cal. 405.

² See *Wilson v. Anderton*, 1 B. & Ad. 450, per Lord Tenterden.

³ *Ib.*; *Cook v. Holt*, 48 N. Y. 275; 2 Kent Com. 568 and *n.*; *Story Bailm.* §§ 110-112; 2 *Story Eq. Jur.* §§ 801, 806, 823.

⁴ *Britton v. Aymar*, 23 La. Ann. 63; *Story Bailm.* § 102

the surrender to another was compelled, the bailor cannot hold him responsible.¹ While, too, a bailee may not dispute his bailor's title, he may show that some third person to whom the bailor transferred such title, has given notice of his right, and that to him the bailee must account.²

A gratuitous bailee cannot defend an action for repossession brought by the bailor's vendee, by pleading that the bill of sale under which the plaintiff claims is fraudulent. For a sale which creditors might set aside as fraudulent will meantime bind the parties in immediate interest;³ and a bailee should set up no technical plea in derogation of his undertaking.⁴

§ 61. **Effect of Death upon the Bailment.**—The death of a bailee without reward, if not actually terminating the bailment, gives the bailor the right at all events to put an immediate end to it, and reclaim his property. Nothing but the bailee's possible lien for reimbursement or *jus tertii* can obstruct him. Hence, a third person coming into possession of the thing bailed among the dead man's effects, though he be a coroner, cannot resist the bailor's demand by setting up the title of the deceased bailee's personal representatives.⁵ In general, the death of a mandatary or agent, being founded in personal confidence, will dissolve the relation; but, according to Judge Story, who follows the rational maxim of the civil law, a partial execution might oblige his representatives to complete it; which is commonly done where the bailee withholds his countermand, and the trust requires no great

¹ *Ogle v. Atkinson*, 5 Taunt. 759; *Story Bailm.* § 102; *Wilson v. Anderton*, 1 B. & Ad. 450; *Cheesman v. Exall*, 6 Ex. 341; *Bates v. Stanton*, 1 Duer, 79; *Cook v. Holt*, 48 N. Y. 275; *Fisher v. Bartlett*, 8 Me. 122; 2 Kent Com. 566-568; *Magdeburg v. Uihlein*, 53 Wis. 165.

² *Roberts v. Noyes*, 76 Me. 590.

³ *Hendricks v. Mount*, 5 N. J. L. 738; *Brown v. Thayer*, 12 Gray, 1. And see *Bangs v. Beacham*, 68 Me. 425.

⁴ *Supra*, § 22; *Magdeburg v. Uihlein*, 53 Wis. 165.

⁵ *Smiley v. Allen*, 13 Allen, 465.

exercise of skill.¹ The death of the mandator, or principal, on the other hand, operates at once a revocation of authority : which the common law vigorously insists upon, whether the gratuitous mandatary or agent knows of the circumstance or not.² But bailment undertakings stand not on the strict footing of agency ; and were the question to arise with reference to a duly diligent accomplishment by some bailee without reward who had not learned of his bailor's death, we apprehend he would not be severely dealt with ; for our modern inclination is to that civil policy which upheld all the acts performed in good faith by an agent after his principal's death, while as yet he was not aware of the fact.³

§ 62. **Where the Bailment is Joint or Common.**—The law of agency, likewise, treats a joint authority to two persons as terminated by the death of either.⁴ In the case of joint bailees, each is commonly responsible for the whole undertaking.⁵ Again, a strictly joint bailment by two or more calls properly for redelivery on their joint order, or to all and not one of the joint bailors.⁶ But the common law treats the chattel joint and common ownership with studious indifference ; for it is a relation of much inconvenience, especially if the thing admits, of its nature, no partition.⁷ Where delivery was made by one joint owner without the privity of the others, the bailee is justified, it would appear, in dealing with him alone.⁸ So, too, it is said that there may be a joint

¹ Story Bailm. § 202 ; 2 Kent Com. 643, 644 ; Story Agency, §§ 465, 488–494 ; Pothier de Mandat, n. 101.

² 2 Kent Com. 646 ; Story Bailm. § 205 ; Story Agency, §§ 488–490.

³ Inst. 3, 27, 10 ; 2 Kent Com. 646 ; Story Agency, §§ 488, 497 ; Pothier Contrat de Mandat, n. 101.

⁴ 2 Kent Com. 645, 646.

⁵ Story Bailm. §§ 114, 195.

⁶ Story Bailm. §§ 116, 195 ; 2 Kent Com. 567 ; Brandon v. Scott, 7 El. & Bl. 234, per Campbell, C. J. ; Jones Bailm. 52 ; Rand v. State Nat. Bank, 77 N. C. 152.

⁷ See 1 Schoul. Pers. Prop. §§ 154–167.

⁸ May v. Harvey, 13 East, 197 ; Story Bailm. § 114

deposit under a contract which expressly provides for a several delivery to each person of his share; under which bailment each owner could demand and sue for his own share separately.¹ A modern English case goes so far as to uphold the plea of the depositary of a specific thing that he has restored to one of the co-owners, wherever he is sued at law in the name of all the co-owners for delivering without their joint order; and this on the technical ground that one of these co-owners, by procuring redelivery to himself, has become disabled from suing.² Where, again, the bailee himself is joint owner in that which was bailed him, he must accomplish the undertaking by the usual rules; and yet, it is said, if the thing be indivisible, and any co-owner dispossess him, such bailee cannot get it back.³ But where the personal property of joint and common owners may, like corn or wine, be fairly divided among them, the disposition increases to deal more justly by the dispossessed parties.⁴

§ 63. **Place of Delivery back or over.** — The place where the bailee should redeliver or deliver over, the apparent understanding of the parties, their situation and circumstances, and the character of the thing, must mainly determine. One could hardly undertake to carry the bailor's chattel to a third person without assuming as the place of final delivery a locality remote from that where the bailee accepted delivery; and under certain circumstances, as for a redelivery after

¹ Story Bailm. § 114.

² *Brandon v. Scott*, 7 El. & Bl. 234.

³ Story Bailm. § 114; *Holliday v. Camsell*, 1 T. R. 658.

⁴ 1 Schoul. Pers. Prop. §§ 165-167.

In a recent case, an officer sued parties in damages, for refusing to surrender to him property which he had taken by attachment against one of them, and then delivered to both upon their written receipt to redeliver the same on demand. It was held: (1.) That the officer's bailment to the defendants was a sufficient consideration for their express promise to redeliver it. (2.) That, having given such receipt, they could not set up, as an excuse, that the defendant in the attachment suit had no title to the property. *Clark v. Gaylord*, 24 Conn. 481.

working on the thing, the bailor's premises might be often the most suitable. But every bailee without reward ought to be given the least possible trouble consistently with his actual undertaking; and hence for a mere deposit the place of deposit is presumably the place of final surrender. But wherever the place of redelivery or delivery over was pre-arranged by mutual contract, that contract shall be decisive of the matter.¹

§ 64. **Duty of Rendering an Account.**— Among the duties of a mandatary enumerated by the civilians is that of rendering an account.² Under our system, also, agents who have extensive affairs committed to them, and moreover trustees and other fiduciary officers, are expected to render formal accounts of their transactions, which accounts come often under judicial supervision, and become matters of public record. All this, however, has chiefly to do with property management far more extensive and complicated than is fairly incident to pure bailment undertakings. Account, under the present head, could scarcely be more than the bailee's report of what he had done, with a statement of expenses, if any were incurred. Whether such account is requisite at all should depend upon the complexity and magnitude of the particular undertaking and the plain understanding of the parties; and the final redelivery or delivery over of the thing in suitable condition and after a suitable manner ought usually to suffice wherever a bailee has performed a simple undertaking without reward.³ But assuredly, if the thing be not forthcoming when the bailment is terminated, or if it be produced in a damaged state, the bailee ought upon request to give a satisfactory account therefor, or else stand answerable civilly,

¹ Story Bailm. §§ 117, 118; Pothier *Traité de Dépôt*, n. 56; Roulston v. McClelland, 2 E. D. Smith, 60.

² Harter v. Blanchard, 64 Barb. 617; Devalcourt v. Dillon, 12 La. Ann. 672; Story Bailm. §§ 121, 154, 197, 198.

³ But see Story Bailm. §§ 191-193; Pothier *Contrat de Mandat*, n. 61-66.

and perhaps as a criminal besides.¹ And any depreciation of the thing occurring after his default, the bailee, it would appear, is bound to make good.²

It follows from the course of our investigation that the bailee of chattels who has fully and in good faith accounted to his bailor, cannot be held responsible by third persons of whose adverse claims he was not previously notified.³

¹ *Graves v. Ticknor*, 6 N. H. 537.

² See *Bérard v. Boagni*, 30 La. Ann. 1125.

³ *Dickson v. Chaffe*, 34 La. Ann. 1133; *supra*, § 60.

PART III.

BAILMENTS FOR THE BAILEE'S SOLE BENEFIT.

GRATUITOUS LOAN FOR USE.

§ 65. **Introductory ; Loan for Use defined.** — This next class of bailments resembles the preceding in its one-sidedness of recompense ; whence some have reckoned both under the single denomination of gratuitous bailments.¹ Familiar as this transaction must be in daily life, very few English or American decisions are found, and our guide must be common sense, which is at the foundation of our common law. If honor does not hold the borrower to his duty, delicacy restrains the lender from pursuing his legal remedies. The meagre precedents which are to be drawn from our reports serve mainly to illustrate general principles, save as to the degree of care and diligence required, in which single aspect this bailment differs from all others. The sole benefit now shifts from bailor to bailee, who remains as hitherto the conspicuous figure of the two, but bears what might be styled an open pack from which to help himself, instead of a closed one.

To all practical intent, every bailment for the bailee's sole benefit is a loan for use ; and accordingly we may define the bailment as one for the temporary beneficial use, *gratis*, of a chattel which the borrower must afterwards return.

§ 66. **The same Subject ; Commodatum and Mutuum.** — The Roman jurisprudence, with more exactness than our own, has

¹ 2 Kent Com. 573 ; Inst. 3, 15 ; Story Bailm. §§ 219, 283 ; Jones Bailm. 64, 118.

styled this loan *Commodatum*, to distinguish it from that other loan, *Mutuum*, where the lender was bound to redeliver, not the specific thing furnished him, but, at his option, some other of the same kind. But *mutuum*, we have already shown, is no bailment at all at the common law.¹ And yet in popular speech we blend the two Roman meanings when we speak of "a loan" and "lending;" much to the regret of legal logicians, who would gladly have put in circulation some new word such as "commodate" for the present exigency;² and surely, could the fathers of our bailment law have compassed this, they might well have given over the rest of their Latin jargon.

Dismissing, therefore, that sense of "a loan" or "lending," which implies the replacing in kind, or repayment, let us employ that other, only, which contemplates the specific return of the thing loaned; and, yet more strictly, make the loan of this chapter that which is for favor, and without expectation of recompense to the lender. The lender thus becomes the gratuitous bailor, while the bailee is the borrower. This bailment, like that of hiring for use, approaches the transfer of a title, since the object is to invest some new party, not with possessory rights alone, but with a sort of temporary ownership or limited beneficial enjoyment, and each bailment implies a contract and mutuality; the one, however, being with recompense to the bailor, and the other without it.³

¹ *Supra*, §§ 6, 7. The application of words like "borrower" or "lender" to *mutuum* contracts must be kept distinct from their present sense. See *Fosdick v. Greene*, 27 Ohio St. 484. Yet there may be a present lending with an option in the lender to purchase hereafter. *Whitehead v. Vanderbilt*, 10 Daly, 214.

² *Story Bailm.* §§ 219, 221. See *Ayliffe Pand.* 4, 16, 517; *Jones Bailm.* 64; *Coggs v. Bernard*, 2 Ld. Raym. 909. The term "loan for use," by which Sir William Jones designates the present bailment, corresponds to the French *prêt à usage* employed by Pothier.

³ See *post*, as to the Hired Use of Chattels, Part IV. c. 3.

§ 67. **Heads of the Present Chapter stated.** — The bailment by way of gratuitous loan for use may be discussed under these three heads, elsewhere employed: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment.

§ 68. **Matters Preliminary; Mutuality; etc.** — I. Matters preliminary, including delivery in bailment. *Quasi* bailments of this kind could hardly be found; for, to the bailee's right of temporary enjoyment, the consent, express or implied, of the bailor, is indispensable. Mutuality and a contract require parties legally competent, neither of whom acts under the constraint of fraud, force, or error. No loan so called can prevail against an unwilling owner from whom the thing was extorted, nor, of course, where it was taken without his knowledge; but the pretended borrower is not only without the rights of a bailee, but may, if he meant to appropriate, be indicted for larceny besides.¹ To both bailor and bailee it is open to act personally or by means of an agent.² Nor need the bailor be the full owner, since one having only a qualified or special property in the thing may make of it a loan whose validity only the party with paramount title can lawfully dispute; and the civil law affirms that, with such reservations, even the loan of a thief is unimpeachable.³

§ 69. **Subject-matter of Loan; Things non-consumable, etc.** — Any kind of personal property, corporeal or incorporeal, may become the subject of a loan for use; real estate, under our Anglo-Saxon system, conforming to its own rules.⁴ A

¹ *State v. Bryant*, 74 N. C. 124.

Under the recent policy as concerning married women, which charges the wife's separate property with her separate contract obligations, it may be important to determine whether wife or husband was borrower. See *Hagebush v. Ragland*, 78 Ill. 41; *Story Bailm.* § 229.

² *Supra*, § 19.

³ *Story Bailm.* § 230; *Pothier Prêt à Usage*, n. 18, 46.

⁴ In *Williams v. Jones*, 3 H. & C. 256, 602, the "loan" of a building is pronounced a mere license to use it. See 1 *Schoul. Pers. Prop.* § 94, for the dividing line between real and personal in annexations to the soil.

loan of things consumable in use, however, like wine, corn, or money, cannot in strictness be made, if that use consist in the consumption; for that would constitute *mutuum*, not *commodatum*; and indeed such transaction might well be presumed an outright gift, or, if a consideration were interposed, a sale.¹ Yet here, we may remark, the loan of a thing for use is not necessarily for that sort of use which naturally accompanies possession of the thing. Borrowing, for instance, might arise upon a use for the borrower's convenience in pledging; and for such a purpose corn and wine may as truly be lent as things non-consumable;² so might other cases be supposed, as in the loan of such articles to make a show and enhance a friend's credit. Whatever the character of the use, our bailment confers the right to use only as the borrower and lender expressly or by implication mutually intended.³

§ 70. **Period of Loan; Definite or Indefinite.**—The period of loan may have been definitely fixed in advance, or the loan may be what the Roman law styled *precarium*, that is, one for a time indefinite or during the will of the lender.⁴ The civilians carefully distinguish between the two sorts. But whether such a distinction practically avails at our law is doubtful; for some have said that every loan, at common law, is understood to be so strictly precarious that the lender may terminate it whenever he pleases;⁵ to which view, however, grave objections founded in the mutuality of contracts and the binding force of a consideration which grows out of suffering some hindrance, might be interposed.⁶

¹ Colquhoun Rom. Civ. Law, § 2067; Story Bailm. § 228; *supra*, § 6.

² See *Archer v. Walker*, 38 Ind. 472; Story Bailm. § 225.

³ 2 Kent Com. 573, 574; Colquhoun, § 2067.

⁴ Story Bailm. § 227; Pothier Prêt à Usage, n. 86-88; Colquhoun, §§ 1861, 2067.

⁵ Story Bailm. §§ 253, 258, 277.

⁶ Perhaps the loss to the bailee of an opportunity to procure his loan elsewhere might be set up as consideration for holding the bailor to his

§ 71. **Bailment and Contract for Bailment compared.** — But the binding force of the contract for a particular loan dates, of course, only from delivery; and an owner's bare promise to lend for use, and the other party's promise to borrow, continue alike nude pact meanwhile and unenforceable.¹

§ 72. **Accomplishment of Bailment Purpose; Great Diligence required.** — II. Accomplishment of the bailment purpose. A bailment of the present sort, yielding the bailor by indentment no sort of reward, but only to benefit the bailee, exacts from the latter party the highest degree of diligence known to the law. He is bound to exercise what is called great, or more than ordinary, diligence, and to respond for every loss which is caused by even slight negligence on his part.² The Roman law emphasizes the duty in language still stronger. *Exactissima diligentia* are the words used in the ancient Pandects and by Pothier and other modern civilians.³ Gaius, too, observed of *commodatum* that the advantage the borrower derived from the use of an article required him to keep it safely at his peril.⁴ And the Roman criterion appears to have been that degree of diligence which the most diligent father of a family bestows on his own affairs;⁵

contract to lend the thing for a definite period so long as the borrower does not misuse. Says Coleridge, J., in *Blakemore v. Bristol R.*, 8 El. & Bl. 1035, 1050: "It is surprising how little in the way of decision in our courts is to be found in our books, upon the obligations which the mere lender of a chattel for use contracts towards the borrower. . . . It may, however, we think, be safely laid down, that the duties of the borrower and lender are in some degree correlative." See also *Clapp v. Nelson*, 12 Tex. 370.

¹ See *Thorne v. Deas*, 4 Johns. 81; *Elsee v. Gatward*, 5 T. R. 143; *supra*, § 34.

² *Story Bailm.* § 237; *Jones Bailm.* 64, 65; *Fortune v. Harris*, 6 Jones, 432; *Green v. Hollingsworth*, 5 Dana, 173; *Scranton v. Baxter*, 4 Sandf. (N. Y.) 5; *Wood v. McClure*, 7 Ind. 155; *Bennett v. O'Brien*, 37 Ill. 250; *Hagebush v. Ragland*, 78 Ill. 40.

³ *Dig.* 44, 7, 1, § 4; *Story Bailm.* § 238; *Pothier Prêt à Usage*, n. 56; *Jones Bailm.* 87, 88; *Inst.* 3, 14, 2.

⁴ *Gaius*, III. § 206.

⁵ *Dig.* 13, 6, 8; *Story Bailm.* § 238.

or, as our law might well adapt it, such diligence as one more than ordinarily careful would bestow upon his own property or manifest, under like circumstances.¹

§ 73. **Good Faith requisite; no Misuse, Sale, Pledge, etc.**—Misconduct, then, in a borrower is so intolerable that the law gives him little loop-hole for escape where he deviates from the strict terms of his bailment, and loss or damage of the thing ensues;² and the same, we shall hereafter see, holds also in a measure true of the hired use of chattels. Where the loan was strictly as a personal favor, or for some specified object, an inconsistent use is misuse; and in general for attempting to sell, pledge, give away, or otherwise misappropriate the thing, a borrower, like all other bailees, is answerable as a wrong-doer.³

§ 74. **What is Excusable Loss or Injury.**—But where, on the other hand, the borrower, while pursuing the line of his duty, encounters some mischance, whereby the thing is lost or hurt without even slight negligence on his part, the lender or owner must bear the ill consequences.⁴ And if the thing be injured or destroyed through inevitable accident or *vis major*, or by reason of fire, the fall of a building, or other like casualty; or being an animal if it dies a natural death; or if it be taken or harmed by an invading foe, by highway robbers, or by rioters or insurgents, the loss will not

¹ Lord Holt has said (reading the civil law through Bracton's glasses), that the borrower is bound to "the strictest care and diligence." "So, as if the bailee be guilty of the least neglect, he will be answerable." *Coggs v. Bernard*, 2 Ld. Raym. 909, 915. And see *Vaughan v. Menlove*, 3 Bing. N. C. 475, per Tindal, C. J. -

² *Kennedy v. Ashcraft*, 4 Bush, 530; *Martin v. Cuthbertson*, 64 N. C. 328; *Buchanan v. Smith*, 17 N. Y. Supr. 474; *Lane v. Cameron*, 38 Wis. 603; *Cullen v. Lord*, 39 Iowa, 302; *Stewart v. Davis*, 31 Ark. 518.

³ *Colquhoun* Rom. Civ. Law, § 2067; *McMahon v. Sloan*, 12 Penn. St. 229; *Crump v. Mitchell*, 34 Miss. 449.

⁴ *Fortune v. Harris*, 6 Jones, 532; *Carpenter v. Branch*, 13 Vt. 161; *Wood v. McClure*, 7 Ind. 155; *Watkins v. Roberts*, 28 Ind. 167; *Whitehead v. Vanderbilt*, 10 Daly, 214.

fall upon the bailee unless he appears to have been to blame in the matter.¹ But the operation of causes like these should, to clear the borrower, be under circumstances imputing to him no negligence or misconduct; for if it appear that he carelessly or wilfully exposed the thing to the hazard of such a loss, and failed in diligent efforts to prevent or avert the mischief, his own remissness of duty is deemed to have occasioned the loss, and the law refuses to accept his excuse.² The lender is, however, by no means an insurer of the thing.³

Special investigation of the facts in each case must show whether or no the bailee was remiss in performing his duty. And while the use, and more particularly the usufruct, of a borrowed chattel seldom contemplates the skill, character, and general opportunities brought by the bailee to such performance, that contemplation is not wholly absent; and, indeed, sometimes becomes of considerable moment. Nor is our bailor, so much as in bailments for his sole benefit, expected to regard for himself the fitness of the bailee for the undertaking; for here he naturally yields to a preferred request instead of actively seeking out some one to accomplish a purpose of his cherishing; yet the borrower's reputed character, habits, opportunities and means of performing the bailment may, so far as brought to the lender's knowledge, affect the mutual understanding, and so the understood adjustment of the standard of liability. Thus, in lending a horse, whose manner of keep and driving is of much consequence, the lender would doubtless expect a skilled trainer of such animals, and an adult, to manage the borrowed steed better than some raw and inexperienced youth.⁴

¹ *Ib.*; *Beller v. Schultz*, 44 Mich. 529.

² 2 Kent Com. 574; *Story Bailm.* §§ 210, 241; *Jones Bailm.* 72.

³ *Beller v. Schultz*, 44 Mich. 529.

⁴ See *Crompton, J.*, in *Beale v. South Devon R.*, 12 W. R. 1115; *Wilson v. Brett*, 11 M. & W. 113. *Fortune v. Harris*, 6 Jones, 532, goes

Destruction or damage of the thing, due to natural causes or the ordinary wear and tear, must be borne by the lender, unless the borrower failed to exercise great diligence in its preservation. But in general the bailee ought to be blameless not only in fairly seeking to avoid the peril, but when the peril comes, in using a proper degree of diligence to avert its worst effects; and whether it be in courage or needful precaution he should not fail. It may be incumbent upon him, in case of theft or other loss, to make the loss known and take prompt measures for regaining possession; but under all circumstances he should act like a person of more than ordinary diligence belonging to his class.¹ Nevertheless, if the loss occurred under some generally excusable calamity, it is incumbent upon the plaintiff to establish that the lender was, in fact, to blame.²

§ 75. **Same Diligence as to One's Own no Test.** — That false test of measuring diligence by the bailee's eventual conduct towards his own, already adverted to, again confronts us.³ Under the Roman *commodatum*, the borrower appears to have been required, in logical consistency, to take more care of the lender's property than of his own;⁴ and hence the legal deduction sometimes drawn, that, on occasion of danger, the borrower must preserve the thing borrowed in preference to chattels of his own exposed to the same danger.⁵ This point appears never to have been really adjudicated in our law; but what was said in the former connection may be here of

quite to the extreme of shielding the borrower of a horse from liability for injuries occasioned the animal. Cf. *Rooth v. Wilson*, 1 B. & Ald. 59, where, under circumstances quite similar, even a bailee without recompense was held responsible.

¹ See 2 Kent Com. 574.

² *Beller v. Schultz*, 44 Mich. 529, affords an illustration in point, where the plaintiff erred in offering no proof of actual negligence, when the flag loaned by him proved to have been injured in a hail-storm.

³ *Supra*, § 36.

⁴ Colquhoun Rom. Civ. Law, § 2067; Pandects, 13, 6, 18.

⁵ Colquhoun, § 2067; Dig. 13, 6, 5, § 4.

service as establishing for such tests a merely presumptive force. Any borrower who proves to have saved his own and not the lender's goods in a general calamity makes himself an object of suspicion; and yet even thus he might well clear himself, for our fundamental inquiry is still whether he used due diligence as to the thing committed to him. Thus, we may suppose a shipwreck, where the borrower passes his own and the lender's goods into a boat, but only the latter are washed overboard; or a robbery, where highwaymen, stopping the borrower's coach, lay hands on such secreted valuables as they find (which prove to be those belonging to the lender), and then permit the borrower to drive on. In instances like these there may no fault whatever attach to the borrower, and yet his goods alone are saved; and, if so, the lender must bear the loss, since it was never claimed that the just doctrine of general average would here apply.

To what an extremity the civilians have been pushed in the effort to make their test conclusive appears from a hypothetical case put by Pothier, upon which our own jurists have commented at some length: viz., that of a man's house on fire, so that he has not time to save both his own and the borrowed chattels. Pothier himself, having to admit that where, in the confusion of the moment and without time to deliberate, the borrower lays hold of the first thing that comes to his hands, he cannot be held responsible, yet lays it down, as a doctrine of law, that otherwise the borrowed property, though it be of the lesser value, must be saved first.¹ The French and Louisiana Codes adopt the same rule, whose text may be traced back to imperial Rome.² But to Pothier's refined reasoning on this point Judge Story opposes some common-sense objections;³ and Chancellor Kent well observes,

¹ Pothier *Prêt à Usage*, n. 56; Jones *Bailm.* 69, 70.

² Code Napoléon, art. 1882; La. Code, art. 2870; 2 Kent *Com.* 575 and n.

³ Story *Bailm.* §§ 245-251.

while admitting the good policy of providing against the temptations of self-interest, that when a choice is presented, moral feeling dictates that the most valuable articles be the first snatched from the flames.¹ "The true test of liability, in all cases of this sort," concludes Judge Story, "would seem to be, to ascertain whether there is any negligence in not saving the borrowed goods; and whether there is any superior duty of the borrower to save them and sacrifice his own. Unless there is some such superior duty, it is difficult to perceive what ground there is to impute negligence to the borrower in so calamitous a case."²

§ 76. **Loss or Injury occasioned by Third Persons.** — In general, for loss or injury of the thing inflicted by third

¹ 2 Kent Com. 575 and *n.*

² Story Bailm. § 249 *b.* This whole controversy over the house in flames appears a trivial one, as though indicative of more smoke than fire. Pothier's own admitted exception in favor of a bailee's acts done in the confusion of the moment cuts away half the ground he stands on, and ought to rule out a good plurality of the cases likely to arise. Nor would the case of goods at a fire, saved solely through the exertions of firemen and strangers, come within reach of his doctrine. Now, as to the cases remaining, it is not the question of comparative values alone (which has generated so much discussion), that should determine one's own deliberate action at a fire where deliberation is possible; for other elements exist, such as the comparative bulk of goods, their general nature and quality, their local situation, — whatever, in fact, helps determine which goods may the more prudently be taken. If, of two vases worth each five hundred dollars, one is of gold and the other of lead, upon which would a diligent man most naturally expend his efforts during a conflagration? And must I be deterred from snatching up my jewel-case, which is at hand on my dressing-table, because a borrowed picture of equal value happens to hang in a distant room? To do actual justice, then, short of applying a general average for the benefit of bailor and bailee together, we must narrow Pothier's maxim down to a reach of facts not often attainable; and to ascertain whose existence would require so minute an examination of the attendant circumstances of any fire as fairly, of itself, to solve finally, what to a rational mind appears the bottom problem in the case — viz., whether, in his anxiety to save his own goods, the borrower slackened in the duty he owed, of acting with honor and great diligence in endeavoring to preserve the loaned property safe.

persons, the borrower's responsibility depends upon the fact of his wilful or careless participation therein. If dispossessed without fault, he is not, of course, answerable for the acts of a robber, thief, or other mere stranger; but for damage occasioned by the borrower's own agent, or by one to whom he has, without the lender's permission, committed the custody or let into the use of the thing, the borrower must, as bailee and principal, if not as wrong-doer, respond to his bailor.¹

§ 77. **Bailment affected by Special Contract.**—Special contract may regulate a performance of the present bailment; and seldom can a borrower of valuable chattels be found who has not been laid under some injunction as to the time and manner of enjoying its use, or the bestowal of care upon the undertaking. While courts should reluctantly construe such an agreement so as to reduce the borrower's measure of responsibility, they would perhaps find less difficulty in pronouncing that he had specially assumed the risks of an insurer. Thus, it has been held, where one borrowed government bonds to use as collateral security against his overdrafts, that his simultaneous written promise to "return or account for" the bonds, obliged him to make full restitution, notwithstanding the bonds were stolen without his fault.² But no special contract should be admitted upon doubtful or conflicting evidence.³

§ 78. **Borrower's Right to Use; Incidental Expenses, etc.**—Unlike the class of bailments first discussed, the present kind, being for beneficial use, carries with it a temporary right of enjoyment in the thing bailed; subject, however, to such limitations as the bailor may reasonably be supposed to have made, as to the time, place, and mode of exercising this

¹ 2 Kent Com. 575; *Seranton v. Baxter*, 4 Sandf. 5.

² *Archer v. Walker*, 38 Ind. 472. And see *Story Bailm.* §§ 252, 253; *Pothier Prêt à Usage*, n. 61. The Roman and foreign law are here in accord with ours.

³ *Watkins v. Roberts*, 28 Ind. 167.

right.¹ No recompense for such use vests in the lender. But, unless circumstances warrant a different inference, every gratuitous loan for use should be regarded as so far personal to the borrower by intendment, that strangers cannot be let in to participate.² Mutual intention is to be considered here, and likewise with reference to the right of incurring charges about the thing. For such expenses as may be incidental to preserving the chattel while in actual use, the borrower should ordinarily be bound alone; though, fairly enough, by the foreign law, as probably by our own, an extraordinary expense about it, such as wholly preserves the thing for the owner, justifies the borrower in claiming remuneration.³ Any borrowed domestic animal must be fed and sheltered, and the circumstance that the borrower bears this expense is held not to change the gratuitous nature of the bailment.⁴

§ 79. **Lender's corresponding Duties.** — The lender incurs correlative obligations which the civilians have taken pains to enumerate, as follows: (1) He must allow the borrower to use and enjoy unmolested the thing loaned, as long as the bailment properly lasts.⁵ (2) He must reimburse, not the borrower's ordinary bailment expenses, but such as are out of course in preserving the thing lent.⁶ (3) He must not, knowingly, lend an injuriously defective article without giving the bailee notice of the defects; for even a gratuitous

¹ Story Bailm. §§ 232-234, 254, 255.

² *Bringloe v. Morrice*, 1 Mod. 210; *Scranton v. Baxter*, 4 Sandf. 5; *Wilcox v. Hogan*, 5 Ind. 546; Story Bailm. § 234. Cf. *Lord Camoys v. Scurr*, 9 C. & P. 383, where the loan of a horse on trial was held to justify the borrower in putting on a competent man to try the animal.

³ Cf. Story Bailm. § 256; 2 Kent Com. 576, 577; Pothier *Prêt à Usage*, n. 55; Colquhoun *Rom. Civ. Law*, § 2067.

⁴ *Bennett v. O'Brien*, 37 Ill. 250. *Aliter*, where such animal, *e. g.*, a horse, is taken in distinct consideration of its keep. See *Chamberlin v. Cobb*, 32 Iowa, 161.

⁵ Story Bailm. §§ 271, 272; Pothier *Prêt à Usage*, n. 78.

⁶ Story Bailm. §§ 273, 274; Pothier *Prêt à Usage*, n. 55; 2 Kent Com. 576, 577. See *Bennett v. O'Brien*, 37 Ill. 250.

lending should be to confer a benefit, not to do mischief.¹ As to this last point, the lender is, with reference to his borrower, liable for all damage which directly results from the thing's unsafe condition for the loan, if the lender alone was aware of it;² but not where the defect which occasions the damage was utterly unknown to him, and could not readily have been ascertained.³

§ 80. **Rights of Action against Third Parties.** — The borrower's suit ought, on principle, to be maintainable against any third party who injures the thing or interferes with his possession.⁴ And whether it be because of that special property which some deny to a gratuitous bailee, or the bailee's liability over to his bailor, it is true, doubtless, that the borrower, in the honest maintenance of his rights, may bring trespass, and even trover, for such aggression.⁵ But so slender, after all, is a borrower's interest, that, if the lender may terminate the loan at pleasure, so may he sue third parties in his own name as by virtue of such termination.⁶

§ 81. **Bailment, how and when terminated.** — III. Termination of the bailment. A gratuitous loan for use may be variously terminated: as by lapse of time or full accomplishment of the bailment purpose; loss or destruction of the chattel; operation of law, as in case the bailee should become full owner; or rescission of the contract by mutual consent or the act of either party.⁷

A bailment of this sort is commonly terminable at the bailor's pleasure; nor, perhaps, ought the bailee's own right to be deemed inferior in this respect. And so greatly does the common law favor the lender, that some high authorities

¹ Story Bailm. § 275; Pothier Prêt à Usage, n. 84.

² *Blakemore v. Bristol R.*, 8 El. & Bl. 1035.

³ *McCarthy v. Young*, 6 H. & N. 329.

⁴ *Nicolls v. Bastard*, 2 C. M. & R. 859; *Dumas v. Hampton*, 58 N. H. 131.

⁵ *Ib.* See *supra*, § 54.

⁶ *Ib.*; *Orser v. Storms*, 9 Cow. 687.

⁷ Story Bailm. §§ 257, 777.

assert that he has the same right of recalling his loan at pleasure, whether he has set a fixed term of enjoyment thereto or not; but the courts do not appear to have concluded this point.¹ Should he do so harshly and to the borrower's special injury, the latter ought, at all events, to be able to set up a claim for damages.² The Roman law so strongly compelled justice to be done the borrower, that if the loan was no *precarium*, but of fixed duration, the lender could not revoke it at will, but was obliged to wait until the term had expired, unless the purpose of the loan had already been accomplished, or some unforeseen emergency occurred, so pressing that the lender could not possibly dispense with the thing.³ But in any case the lapse of a definite period of loan will terminate the bailment; and where the loan was for "a day or two," or "a week or two," the borrower should not keep the thing beyond the longer period. Stipulation apart, a reasonable period of use is all any borrower has a right to expect.⁴

If there be uncertainty as to whether the bailment period has actually expired, the lender who seeks to resume the use of the thing ought to make a demand before suing the borrower to recover possession. But the disposition of the courts is to favor the former party; and wherever no such uncertainty exists, or the demand would be an empty form, our law will readily dispense with such preliminaries.⁵ The attempt of a borrower to exercise full ownership over the thing without his lender's permission is a gross breach of faith; and, save so far as the doctrine of a countervailing equity might protect *bona fide* transferees for value, the borrower's wrongful transfer cannot hinder the lender or rightful owner

¹ *Supra*, § 70.

² Story Bailm. §§ 258, 271, 277; Bac. Abr. Bailment, D.

³ Colquhoun Rom. Civ. Law, § 2067; Story Bailm. § 257; Pothier Prêt à Usage, n. 20-27, 76, 77.

⁴ Clapp v. Nelson, 12 Tex. 370; Green v. Hollingsworth, 5 Dana, 173.

⁵ Clapp v. Nelson, 12 Tex. 370; Ross v. Clark, 27 Mo. 549; *post*, as to Hired Use, Part IV. c. 3.

from pursuing the thing as his own and suing, as in tort, for its repossession.¹ The bailee's wrongful transfer should of itself put an end to the bailment; but this, according to the better opinion, for his bailor's advantage rather than his own.²

§ 82. **Borrower's Duty to Deliver back or over.** — A borrower whose time of enjoyment has expired can expect little or no indulgence. His duty becomes fixed to surrender possession, to deliver the thing over immediately to the bailor or his order. Redelivery may be, like the original delivery, through the medium of agents on either side duly empowered.³ In giving up the thing, the bailee should likewise surrender its increments; and it is only so far as the chattel may have been lost or impaired without imputing either fraud or slight negligence to him that his obligation is lightened.⁴ Should he be in positive default as to returning the thing at the proper time, he becomes absolutely accountable for any loss or harm to the thing which may ensue, even if accidentally; though it would be otherwise if the bailor refused to accept redelivery, for then the lender would be in default; and possibly other cases might arise where the honest borrower would not be so harshly dealt with.⁵ The proper place for delivering back the thing is to be ascertained from the special circumstances of the bailment; but in a doubtful issue we may assume that the party conferring the favor was

¹ *Cooper v. Willomatt*, 1 C. B. 672; *Hurd v. West*, 7 Cow. 752; *Esmay v. Fanning*, 9 Barb. 176; *McMahon v. Sloan*, 12 Penn. St. 229; *Crump v. Mitchell*, 34 Miss. 449.

² *Ib.* And see *Wilkinson v. Verity*, L. R. 6 C. P. 206.

³ *Story Bailm.* § 262; *supra*, §§ 19, 59. See *Esmay v. Fanning*, 9 Barb. 176; *Green v. Hollingsworth*, 5 Dana, 173; *Ross v. Clark*, 27 Mo. 549.

⁴ *Story Bailm.* §§ 257, 260; *Pothier Prêt à Usage*, n. 73, 74.

⁵ *Story Bailm.* §§ 257, 259; *Jones Bailm.* 68, 70; *Stewart v. Davis*, 31 Ark. 516; *La. Code*, art. 2870; 2 *Kent Com.* 574; *Pothier Prêt à Usage*, n. 60; *Cases of Ilire, post.*

not expected to be at the personal pains of seeking out his beneficiary.¹

The final delivery will most naturally be to the lender himself, unless he has ordered otherwise;² but the borrower is not to exercise his own option, nor to set up an adverse title in himself or others; though if a rightful owner should put him at legal jeopardy, or he should be forcibly dispossessed, this is another matter.³ On the lender's death the borrower becomes commonly bound to restore the chattel to the lender's executor or administrator.⁴ But on the borrower's death the bailment, if not thereby legally dissolved, may usually be cut short by the bailor, whose demand for his property cannot be successfully resisted by a party in temporary custody on any plea that the borrower's personal representatives should have it.⁵

§ 83. **Whether Borrower may detain for Expenses.** — A borrower has no right, except it be under a special contract, to detain the chattel for any general demand he may hold against his lender;⁶ nor for the ordinary expenses he may have incurred about the thing, since these should be borne by the borrower himself. But for some such extraordinary expense as permanently benefits the chattel and was found needful for its preservation, the borrower may charge his lender; to which extent it would appear that his lien thereon is good for his reimbursement; unless, perhaps,

¹ Story Bailm. § 261; Pothier Prêt à Usage, n. 36, 37. *Esmay v. Fanning*, 9 Barb. 176, favors regarding the lender's residence as the place of redelivery; and so did the Roman law.

² Story Bailm. § 265; *Simpson v. Wrenn*, 50 Ill. 222; *Nudd v. Montanye*, 38 Wis. 511. See *Lain v. Gaither*, 72 N. C. 234, as to whether the borrower may set up title in the lender's assignee in bankruptcy.

³ *Biddle v. Bond*, 34 L. J. Q. B. 137, per Blackburn, J.; *The Idaho*, 93 U. S. 575, per Mr. Justice Strong; Story Bailm. § 266; *Watkins v. Roberts*, 28 Ind. 167.

⁴ Story Bailm. § 265; *supra*, § 59.

⁵ *Smiley v. Allen*, 13 Allen, 465. Here the custodian was a coroner.

⁶ 2 Kent Com. 574; Pothier Prêt à Usage, n. 44; Story Bailm. § 264.

he was remiss in procuring his lender's sanction to the expenditure.¹

§ 84. **Intervention of Lender does not release Borrower from Liability.**—Should injury happen to the chattel while in the borrower's hands, the lender's intervention to remedy the mischief does not release the borrower from liability for causing it through his own negligence or misconduct.²

¹ 2 Kent Com. 576; Story Bailm. §§ 273, 274; *supra*, § 78.

² Bayliss v. Fisher, 7 Bing. 153; Todd v. Figley, 7 Watts, 542; Story Bailm. § 269.

PART IV.

ORDINARY BAILMENTS FOR MUTUAL BENEFIT.

CHAPTER I.

BAILMENTS FOR HIRE IN GENERAL.

§ 85. **Bailments Gratuitous and for Hire compared.**—In passing from gratuitous bailments to those intending a mutual benefit, from the one-sided undertaking to that which puts the rights of the parties in balance, we are at once impressed by the similitude borne by these two classes, with regard to the varied purposes which the bailment may seek to accomplish. This similitude jurists have somewhat obscured by a promiscuous use of Latin epithets, but it is traceable notwithstanding. Our chattel for mutual benefit is delivered as before. And this delivery may be, to speak roundly, (1) for its deposit, or (2) for the performance of some work upon it, or (3) for its carriage—in all of which three instances the bailee has the main undertaking to perform. Or it may be (4) for beneficial use, where the bailee is to derive some temporary enjoyment. In only one marked instance (5) that of pledge, or delivery in security for some debt or engagement, does the bailment for mutual benefit present an essentially new class of transactions; and this is only accumulative. As under our former heading, it will appear that a mutual-benefit bailee, who assumes a burden (that is to say, one who does not take for beneficial use) has a duty to perform in which the elements of custodian, workman, and carrier, might, according to the mutual understanding of parties, be blended in various ways. For, after

all, the difference of legal principle arises only from the introduction of a make-weight, namely, recompense, or the *quid pro quo* for doing as before.

§ 86. **Hiring and Letting; the Roman Locatio-Conductio.** — Leaving the transaction of taking in security to stand for treatment upon its own peculiar merits, to mutual-benefit bailments otherwise created, we are wont to apply, for want of more precise English words, the terms *Hiring* and *Letting*. But that these terms are thus used in their full popular or legal sense, is not to be pretended. For, as to *hiring*, we must put out of mind, first, the general engagement of one's personal services for reward, since bailment operates purely *in rem*; and next, the hire for use of real estate, inasmuch as personal property or the chattel is our only appropriate subject-matter. This leaves us with two distinct applications of the word: the one, to denote the procuring of labor and service about a chattel for a recompense, in which the bailor is hirer, and the bailee takes the recompense; the other, the procuring for recompense of the beneficial use of a chattel, where it is the bailee who hires while recompense falls to the bailor. And so correspondingly with *letting*; a word so uncouth, however, in the present connection, that we shall dispense with it as much as possible. The bailment for hire, then, may be defined as one in which recompense is to be given either for services about a chattel, or for its temporary use.¹

The Roman law (in which, however, one discovers no comprehensive theory of bailments) used the compound *locatio-conductio* in the present connection, though not without some confusion of meaning.² *Locatio-conductio* withheld

¹ See Bouv. Dict. "Hire," "Let;" Story Bailm. § 363; 2 Kent Com. 585.

² Gibbon, in his famous chapter upon Justinian's Code, tries naturalizing the word "location" in this connection. 4 Gibbon Rome, c. 44. And Judge Story half inclines to follow him. Story Bailm. § 369. But the other English meanings of this word might be thought to make its present use somewhat objectionable.

a transfer of the owner's property right while it gave possession; the term importing a price or recompense. It might arise *de re utenda*, for the use of a thing; otherwise for labor and service. The *locator* was the party who put the thing out, and the *conductor* the party undertaking performance; although, as some commentators show, a party undertaking to perform labor and services was sometimes styled, from his special standpoint, *locator operarum*, as well as *conductor operis*.¹ From the French civilians we get a wider range of terms—*locateur*, *loueur* or *bailleur*, denoting the one who puts the thing out, and *conducteur*, *preneur*, *locataire*, the corresponding party who performs upon it.²

§ 87. **Classification of Ordinary Bailments for Hire.**—In the next two chapters the ordinary bailment for hire will receive treatment so as to show separately (following the order pursued in gratuitous bailments), *first*, the hire of services about a chattel; *second*, the hired use of a chattel. And under the first head we shall incidentally distinguish these kinds: the service of custody of the thing, the service of bestowing work upon it, and the service of carrying it from one place to another; not for the sake, however, of making blunt dissection of a bailment purpose which often runs into complexity. But extraordinary or exceptional bailments, notably Innkeepers and Common Carriers, we reserve for later and distinct treatment.

The civil law of *locatio-conductio* laid stress, apparently, upon the subdivisions above noted: for there was *locatio custodiæ*, or the hire of the thing's custody; *locatio operis faciendi*, or the hire of work and labor upon the thing; and *locatio operis mercium vehendarum*, or the hire of its carriage.³

¹ Colquhoun Rom. Civ. Law, § 1668; Jones Bailm. 36, 90; Story Bailm. § 369.

² Pothier Contrat de Louage, n. 1.

³ Story Bailm. §§ 8, 370, 422, 442. And see *supra*, §§ 13, 14; Jones Bailm. 36, 85, 90, 103, 117; *Coggs v. Bernard*, 2 Ld. Raym. 909. Possibly *locatio custodiæ* is only a term coined for modern convenience, and the Roman

There was also *locatio rei*, or the hiring for temporary use.¹

§ 88. **Essentials of Bailment Contract for Hire.**—To all bailment contracts for hire, these three things are found essential: (1) a chattel or chattels as the subject-matter; (2) a recompense; (3) mutual assent to accomplishing a specific bailment purpose towards such chattel or chattels for such recompense.

§ 89. **Essential of Chattel as Subject-Matter.**—1. That there should be a chattel or chattels as the subject-matter is implied in every bailment from its definition. Real estate is therefore excluded; but any kind of personal property, corporeal or incorporeal, may furnish a subject-matter, whether in the tangible thing itself, or, as to things incorporeal, in some muniment of title which is capable of delivery.² But that which has not yet come into existence as property, or which exists as such no longer, cannot be the subject-matter of a present undertaking for hire.³

§ 90. **Essential of Recompense.**—2. As to a recompense, *pretium*, or price, is the Roman term, which we employ with quite an extensive meaning in our law of sales.⁴ This recompense need not be definitely fixed, provided it be ascertainable from the contract; and it may have been tacitly implied as well as expressly agreed to. In the absence of more positive proof, we may regard compensation in a particular bailment

hire of custody was silently included under *locatio operis faciendi*. See Colquhoun Rom. Civ. Law, § 1668; Story Bailm. *supra*; 2 Kent Com. 586. Except to legal antiquarians, however, this technical difference is of little consequence.

¹ Story Bailm. § 383.

² Story Bailm. § 373.

³ Story Bailm. §§ 372, 373; *Coggs v. Bernard*, 2 Ld. Raym. 909; Pothier Contrat de Louage, n. 7; 2 Schoul. Pers. Prop. §§ 207–210; Benj. Sales, bk. 1, pt. 1, c. 4; 2 Kent Com. 585, 586.

⁴ Colquhoun Rom. Civ. Law, § 1668; Benj. Sales, bk. 1, pt. 1, c. 1; 2 Schoul. Pers. Prop. § 211; Story Bailm. §§ 374–376; 2 Kent. Com. 585, 586.

to be such as, consistently with local and business usage and the general situation and circumstances of the parties, would be just and reasonable. If left to some third party to fix, the essential is supplied on his *bona fide* performance of the trust.¹ Bailment recompense is commonly in money; but not indispensably so, as some other kind of property would suffice, some service, some contemplated advantage;² and even a benefit contingent and indirect, such as the opportunity of getting more business, may, it is held, take a bailment out of the gratuitous class.³ But the idea of recompense includes, of course, the giving in return of something valuable; and an undertaking essentially gratuitous by mutual intentment is not to be construed into an undertaking for hire, merely because of some trivial advantage the bailee might incidentally derive.⁴

§ 91. **Essential of Mutual Assent to a Specific Accomplishment.** — 3. Mutual assent to accomplishing a specific bailment purpose towards the specific chattel or chattels for the specific recompense is our third essential; this accomplishment requiring, of course, that delivery precede, and delivery back or over follow. This mutual assent must relate to the particular subject-matter whose continuous identity our law of bailments so carefully preserves; likewise to the particular compensation.⁵ For if I promise to hire a certain horse, the bailor's assent must not attach to a different horse, else there would be no mutual understanding, but rather a misunderstanding. So, too, if the bailee offered one recompense while the bailor assented to another, the essential mutuality would be wanting. Error going to the essentials invalidates the

¹ 2 Schoul. Pers. Prop. §§ 211-217; Benj. Sales, bk. 1, pt. 1, c. 5; Story Bailm. §§ 374-376; Pothier Contrat de Louage, n. 37.

² White v. Humphery, 11 Q. B. 43; Parker v. Marquis, 64 Mo. 38; Chamberlin v. Cobb, 32 Iowa, 161; Francis v. Shrader, 67 Ill. 272.

³ Newhall v. Paige, 10 Gray, 363.

⁴ See Carpenter v. Branch, 13 Vt. 161.

⁵ 2 Schoul. Pers. Prop. § 205; Story Bailm. § 378.

contract; and fraud or force on either side renders it voidable by the aggrieved party.¹

The mutual assent thus reached, positive words and acts may evince; so, too, is it inferable from the conduct of the bailment parties at the time of the transaction, and various surrounding circumstances. But, reduced to its simplest elements, there would appear an offer to hire accompanied by the acceptance thereof; which offer and acceptance once clasping together, the contract for hire would stand complete. Bailment and the delivery for the agreed purpose might or might not be contemporaneous with such contract.²

§ 92. **The same Subject; Competent Parties; a Lawful Purpose.**—A contract of hire should, like any other contract, be entered into by competent parties; and as to parties under legal disability, such as infants, the usual rules apply.³

The contract must not be such that accomplishing the bailment purpose would involve the execution of an unlawful purpose, or contravene good morals and public policy. Thus, the agreement to bail on hire a revolver for committing murder, or tools for burglary, or furniture for purposes of prostitution, is illegal and void. Equally void are bailment contracts to aid a public enemy, and, where revenue laws are in force, for hiring a smuggling vessel.⁴ Public policy and the legislation which reinforces it may change with public opinion, but the vital principle remains. And here we may observe that Sunday laws and their enforcement occupy our courts with reference to bailment contracts more than all the

¹ Story Bailm. § 381; 2 Schoul. Pers. Prop. §§ 205, 218; Benj. Sales, bk. 1, pt. 1, c. 3, § 1; *Parker v. Marquis*, 64 Mo. 38.

² 2 Schoul. Pers. Prop. §§ 218-221.

³ Story Bailm. § 480; Pothier Contrat de Louage, n. 42. Thus an infant cannot be compelled in damages for breach of his contract. *Dilk v. Keighley*, 2 Esp. 480; *Jennings v. Rundall*, 8 T. R. 335. But for his torts it is otherwise. *Homer v. Thwing*, 3 Pick. 492.

⁴ Story Bailm. § 379; Pothier Contrat de Louage, n. 26; 2 Schoul. Pers. Prop. §§ 617-625; Benj. Sales, bk. 3, c. 3, § 1.

other instances of illegality put together; and this chiefly with reference to horse-driving on that day.¹ These laws, which are to be found in the statute books of England, and most, if not all, of the United States, prohibit, in terms more or less sweeping, all travelling on the Lord's day, except on occasion of necessity and charity, and moreover the transaction of secular business.² The modern rule, which runs a hair-line for such cases, and likewise for other bailment contracts tainted with illegality, upon which bailor or bailee seeks a remedy, is as follows: if the party who sues can show a complete cause of action without proof of his own illegal act, he may recover, even though such illegality may incidentally appear in testimony; but wherever illegality must be proven by him as part of his cause of action, he cannot recover.³

§ 93. **Contract for Hire compared with Contract of Sale.**—The bailment contract for hire is thus seen to resemble in essentials the contract of sale (from whose analogies must in truth be derived most of the guiding maxims at the present imperfect stage of our bailment law), with only the radical difference that there a full transfer of one's property in a thing is contemplated, but here only possession with at most temporary rights. In the one instance we watch to discover the passage over of a full title; in the other, of a mere corporeal delivery, to be followed by delivery back or over.

§ 94. **Contract for Hire distinguished from Bailment.**—But our contract for a mutual-benefit bailment may live before the bailment; since, any contract of hire once completed, the parties acquire mutual rights and duties which are enforceable, and for what is called non-feasance, or the failure of

¹ See 2 Schoul. Pers. Prop. §§ 617-626; as to Hired Use, *post*, c. 3.

² *Ib.*

³ Carpenter, J., in *Frost v. Plumb*, 40 Conn. 111. See *Stewart v. Davis*, 31 Ark. 518; *Hall v. Corcoran*, 107 Mass. 251; *Fisher v. Kyle*, 27 Mich. 454; *Gregg v. Wyman*, 4 Cush. 322; *Whelden v. Chappel*, 8 R. I. 230; *Woodman v. Hubbard*, 5 Fost. 67; *Morton v. Gloster*, 46 Me. 520.

either to fulfil his part, the injured one may compel redress.¹ And this non-feasance may consist in the failure of the one to make or of the other to accept the promised bailment delivery. Herein differs the bailment for mutual benefit radically from the gratuitous sort hitherto discussed.²

Yet, this contract of hire being but the contract for a bailment, the bailment itself arises, as of course, only upon delivery and acceptance, with intent of delivering back or over; and to the performance, well or ill, of the undertaking, possession by the bailee is indispensable.³ Nor should it be thought that bailments for mutual benefit necessitate a contract and mutual terms. For, as in gratuitous undertakings, there may exist what we call a *quasi* bailment, or bailment not strictly upon contract; namely, one whose conditions are satisfied with the voluntary acceptance of possession by one who expects some reward for his service; as, for instance, the lawful captors of a vessel, salvors, and (under exceptional circumstances, where a reward was offered) finders on land; and further, where their employment *in rem* goes not unrecompensed, sheriffs, clerks, and other officers of the law. All of these, because of a mutually beneficial possession in fact, are, regardless of an owner's permission, treated, for convenience, as hired bailees.⁴ And as to tortious possession, the obligation is not lower than that of a mutual-benefit bailment, and may be much higher.⁵

¹ See *Thorne v. Deas*, 4 Johns. 84; *Elsee v. Gatward*, 5 T. R. 143; *Story Bailm.* §§ 334, 436; 2 Kent Com. 570.

² *Ib.*; *supra*, §§ 21, 34, 71.

³ The use of the Latin term *locatio-conductio*, or putting out and bringing again, seems to convey this sense of delivery, and delivery back or over.

⁴ *Story Bailm.* §§ 130, 613-624; *Witowski v. Brennan*, 41 N. Y. Super. 284; *Phelps v. People*, 72 N. Y. 334; *Cross v. Brown*, 41 N. H. 283; *supra*, § 28.

⁵ See *Homer v. Thwing*, 3 Pick. 492; *Ray v. Tubbs*, 50 Vt. 688; *Frost v. Plumb*, 40 Conn. 111; *Hall v. Corcoran*, 107 Mass. 251; *supra*, § 18.

CHAPTER II.

HIRED SERVICES ABOUT A CHATTEL.

§ 95. **Classification of the Present Chapter.**—The leading divisions of the present chapter are these: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment. These correspond to the divisions hitherto employed in treating of bailments without recompense.¹

§ 96. **Matters Preliminary; Vocations for Hire.**—I. Matters preliminary, including delivery in bailment. There are numerous business vocations whose pursuit involves the bailment exercise of one or more of these three chief kinds of hired service: viz., (1) hired custody of a thing, (2) hired work upon a thing, and (3) hired carriage of a thing. Among hired custodians are, safe-depositaries, or those who, for reward, take money and valuables into secure places on special deposit;² warehousemen, a designation more generic, but familiarly applied to such as, for reward, keep goods and merchandise on storage;³ wharfingers, who, for reward, undertake the charge of goods and merchandise on wharves;⁴ and agistors, so called, who, for reward, take care of domestic animals,⁵—an occupation which embraces those who stable

¹ *Supra*, § 25.

² See *Safe-Deposit Co. v. Pollock*, 85 Penn. St. 391; *supra*, § 30.

³ *Bouv. Dict.*; *Story Bailm.* § 444. Under the United States laws, warehouses are kept for dutiable goods, subject to the legislation of Congress. *Corkle v. Maxwell*. 3 Blatchf. 413; *Cartwright v. Wilmerding*, 24 N. Y. 521; *Schwerin v. McKie*, 51 N. Y. 180.

⁴ *Bouv. Dict.*; *Story Bailm.* §§ 451, 452; *Rogers v. Stophel*, 32 Penn. St. 111; *The Francesca*, 9 Ben. 34.

⁵ *Bouv. Dict.*; *Story Bailm.* § 443; *Smith v. Cook*, 1 Q. B. D. 79.

horses for their customers.¹ Those regularly employed in doing hired work upon chattels are styled workmen, mechanics, artificers, artisans; terms which may here be not inappropriately used as designating a wide range of secondary manual pursuits, upon a thing of unchanged identity, from cobbling a shoe to rigging out a vessel.²

The hired carriage of chattels is a pursuit of such vast responsibility that public policy has taken the bailment under its own wing, as we shall show hereafter; but a distinction lies between Private Carriers and Public or Common Carriers. Private Carriers, or such as fall without the restraints of public policy, can seldom be found as a class in modern times; but we usually designate as such a party who, not making hired transportation his calling, undertakes to transport, for reward, on some special occasion.³ But Public or Common Carriers, as well as those who become virtual custodians from exercising the pursuit of Innkeeper, are clothed with exceptional responsibilities.⁴

§ 97. **Vocation is of Secondary Consequence.** — But, save as to the exceptional bailments, the vocation is here of only secondary legal consequence; and for hired as well as gratuitous service, notwithstanding the important bearings of business usage, each bailment stands on its independent merits, and one's promise and acceptance is to be discussed with primary reference to the particular undertaking and particular circumstances. Some, again, whose pursuits have been enumerated, warehousemen and wharfingers, for instance, may appear in one aspect as custodians, and in another as workmen, or even carriers of the thing delivered.⁵

¹ *Ib.* And see 2 Kent Com. 591.

² Story Bailm. § 422; 2 Kent Com. 588; *Menetone v. Athawes*, 3 Burr. 1592.

³ Story Bailm. §§ 457-459; *White v. Bascom*, 28 Vt. 268; *Pennewill v. Cullen*, 5 Harr. 238. See Common Carriers, *post*, § 323.

⁴ See Part V., *post*.

⁵ Story Bailm. §§ 446, 449; *White v. Humphery*, 11 Q. B. 43.

§ 98. **Whether Bailment is for Hire or Gratuitous.** — The three essentials of the bailment contract for hire have already been considered.¹ But as to one of these, recompense, the circumstances must, in a doubtful case, resolve whether a reward was mutually intended or not; whether, in other words, the bailment is for hired service with its greater responsibilities, or for gratuitous service with its less. Here the bailee's usual course of dealing, his line of business, is an important, and often a decisive, circumstance.² Recompense or no recompense refers, too, we must remember, not to the result of the undertaking, but to mutual expectation at the outset. And between recompense and non-recompense bailments, the line of demarcation is often very narrow;³ as where, on the one hand, I bail my horse, to be broken, by the bailee, to service, and, on the other hand, lend it to the bailee for free rides;⁴ or where the custom of trade makes that a part of the consideration which otherwise might be thought a special gratuitous undertaking.⁵

§ 99. **Doctrine of Accession; Repairs by Workman, etc.** — Where materials are to be employed in repairing a thing, the law of accession comes into view, whose presumption is that, notwithstanding one's added materials be worth more than the other's principal thing, a bailment was mutually intended, whereby the owner of the thing left for repair remains such while the work is being completed, and afterwards.⁶ So, if

¹ *Supra*, § 88.

² *Pattison v. Syracuse Nat. Bank*, 4 Thomp. & C. 96; *Second Nat. Bank v. Ocean Nat. Bank*, 11 Blatchf. 362; *Dart v. Lowe*, 5 Ind. 131; *Kirtland v. Montgomery*, 1 Swan, 452; § 29 *supra*.

³ *Chamberlin v. Cobb*, 32 Iowa, 161; *Francis v. Shrader*, 67 Ill. 272; *Carpenter v. Branch*, 13 Vt. 161.

⁴ *Francis v. Shrader*, 67 Ill. 272. And see *White v. Humphery*, 11 Q. B. 43.

⁵ *Gaff v. O'Neil*, 2 Cin. (Ohio) 246.

⁶ See 2 Schoul. Pers. Prop. §§ 27-39; 2 Kent Com. 360-364.

raw materials be delivered by the owner, to be worked up into a new chattel and returned, there is presumably no change of title; though, were the chattel to be manufactured by the workman himself, out of his own principal materials, he would appear to be no bailee, but the owner, bound to an executory contract of sale.¹ If, once more, an owner left his materials to be worked up, or something to be repaired, on the mutual understanding that the workman might return, not the identical thing, nor the materials in their new shape, but something similar, there would be created a *mutuum*, or sale by the owner, and no bailment.²

§ 100. **Delivery and Acceptance considered.**—Until delivery of the chattel there is no bailment, but at the most the right to a bailment under some bailment contract; either party to which contract, if for hired service about a chattel, may, for a breach, compel specific performance, or sue in damages;³ but, upon the concurrence of delivery and acceptance, the parties assume the full relation whose rights and obligations we shall proceed to discuss. Delivery and acceptance may be through the medium of agents; and both parties, or either, may act in a personal or representative capacity, according to the circumstances. There may be constructive instead of actual delivery, or a receipt in the character of bailee; as where one continues the hired custodian of that which he has first sold, or, like a salvor or officer of justice entitled to reward, comes into possession by a justifiable taking, rather than acceptance.⁴ There may be either actual or constructive acceptance; but, without something that shows the knowledge and intent to become a bailee, no

¹ *Ib.*; Gregory v. Stryker, 2 Denio, 628; McConihe v. New York R., 20 N. Y. 495; Stevens v. Briggs, 5 Pick. 77; Pulcifer v. Page, 32 Me. 404; Arnott v. Kansas Pacific R., 19 Kan. 95.

² 2 Schoul. Pers. Prop., § 38; *supra*, § 6; Powder Co. v. Burkhardt, 97 U. S. 110.

³ See Elsee v. Gatward, 5 T. R. 143; Thorne v. Deas, 4 Johns. 84.

⁴ *Supra*, §§ 4, 93.

bailment can be inferred.¹ On all of these points we have touched before.²

§ 101. **Accomplishment of the Bailment Purpose; Standard of Care and Diligence.** — II. Accomplishment of the bailment purpose. Let us now consider the legal obligations of a hired bailee. He ought, in good faith, to perform the intended service about the chattel, in the exercise throughout of the requisite degree of care and diligence, whether it relate to mere custody, or work of a more active sort. The requisite degree which our law prescribes is styled "ordinary;" and ordinary or the average care and diligence is such as prudent persons of the same class are wont to exercise towards such property or in the management of their own property under like circumstances. It follows that, for loss or injury of the thing, caused by the hired bailee's ordinary negligence, or failure to bestow this ordinary or average care and diligence, he must respond.³ Such is the criterion in the absence of special modifying stipulations.

¹ *Rogers v. Stophel*, 32 Penn. St. 111; *Spangler v. Eicholtz*, 25 Ill. 297; *Cox v. Reynolds*, 7 Ind. 257. And see *Feltman v. Gulf Brewery*, 42 How. N. Y. Pr. 488.

² *Supra*, §§ 21, 34, 94.

³ 2 Kent Com. 588, 591; *supra*, § 15.

Ordinary diligence is exacted from warehousemen. *Cailiff v. Danvers*, Peake, 114; *Batut v. Hartley*, L. R. 7 Q. B. 594; *Titsworth v. Winnegar*, 51 Barb. 148; *Vincent v. Rather*, 31 Tex. 77; *Morehead v. Brown*, 6 Jones, L. 367; *Moulton v. Phillips*, 10 R. I. 218; *Jones v. Hatchett*, 14 Ala. 743; *Myers v. Walker*, 31 Ill. 353; *White v. Colorado Central R.*, 3 McCr. 559; *Story Bailm.* § 444; *Schwerin v. McKie*, 51 N. Y. 180 (a case of warehousing under United States laws); *Jones v. Morgan*, 90 N. Y. 4.

From safe-depositaries. *Safe-Deposit Co. v. Pollock*, 85 Penn. St. 391; *National Bank v. Graham*, 100 U. S. 694, 704.

From wharfingers. *Sidaways v. Todd*, 2 Stark. 400; *Foote v. Storrs*, 2 Barb. 326; *Rogers v. Stophel*, 32 Penn. St. 111; *Cox v. O'Riley*, 4 Ind. 368; *Story Bailm.* § 451; *The Francesca*, 9 Ben. 34.

From agistors of cattle. *Story Bailm.* § 443; *Smith v. Cook*, 1 Q. B. D. 79; *Maynard v. Buck*, 100 Mass. 40; *Halty v. Markel*, 44 Ill. 225; *Eastman v. Patterson*, 38 Vt. 146; *McCarthy v. Wolfe*, 40 Mo. 520; *McMahon v. Field*, 7 Q. B. D. 591.

From forwarders and private carriers for hire. 2 Kent Com. 591; *Story*

If, therefore, in the course of his honest exercise of average diligence, while performing the bailment service, the chattel perish from some internal defect, or through the operation of natural causes, or, generally, because of inevitable accident, the bailee will stand acquitted of blame.¹ So, too, if it be destroyed or captured by a public enemy.² But the intervention of irresistible force, whether of human or divine agency, excuses no hired bailee, whose wrongful connivance or culpable exposure, or breach of contract, or remissness of duty in any respect, whether for preventing the calamity, or lessening its injurious effects, proves to have proximately occasioned

Bailm. § 444; Common Carriers, *post*; *White v. Bascom*, 28 Vt. 268; *Pennewill v. Cullen*, 5 Harr. 238.

And from workmen upon chattels, generally. *Clarke v. Earnshaw*, 1 Gow. 30; *Baird v. Daley*, 57 N. Y. 236; *Spangler v. Eicholtz*, 25 Ill. 297; *Russell v. Koehler*, 66 Ill. 459; *Hillyard v. Crabtree*, 11 Tex. 264; *Halyard v. Dechelman*, 29 Mo. 459; *Smith v. Meegan*, 22 Mo. 150; 2 Kent Com. 588; *Story Bailm.* § 429; *Kelton v. Taylor*, 11 Lea, 264.

The same standard of ordinary care is applied to *quasi* bailees not acting wrongfully. As for instance, to captors and prize-agents. *Story Bailm.* §§ 614, 615; *The Maria*, 4 Rob. Adm. 348; *The Anne*, 3 Wheat. 435; *The George*, 1 Mas. 24; *Burke v. Trevitt*, 1 Mas. 96. To one who holds the property in a replevin suit under a bond. *Bobo v. Patton*, 6 Heisk. 172. To sheriffs, receivers, and judicial officers in general, whose duty towards the thing is for recompense. *Blake v. Kimball*, 106 Mass. 115; *Cross v. Brown*, 41 N. H. 283; *Story Bailm.* §§ 620, 621; *Witowski v. Brennan*, 41 N. Y. Super. 284; *Aurentz v. Porter*, 56 Penn. St. 115; *Burke v. Trevitt*, 1 Mas. 96.

So to finders, when stimulated by the offer of a reward, and to salvors. *Nicholson v. Chapman*, 2 H. Bl. 254; *Cargo ex Schiller*, 2 P. D. 145; *Wentworth v. Day*, 3 Met. 352; *Cummings v. Gann*, 52 Penn. St. 484. And see 2 Schoul Pers. Prop. §§ 14, 15; *Story Bailm.* §§ 621-624; *Brightly Dig. Salvage*, VII.; *The Thetis*, L. R. 2 Ad. & Ec. 365; *Peisch v. Ware*, 4 Cranch, 347; *Dows v. Nat. Exch. Bank*, 1 Otto, 618.

¹ *Norway Plains Co. v. Boston & Maine R.*, 1 Gray, 263; *Cowles v. Pointer*, 26 Miss. 253; *McCullom v. Porter*, 17 La. Ann. 89; *Francis v. Dubouque R.*, 25 Iowa, 60; *Waller v. Parker*, 5 Coldw. 476; *Story Bailm.* § 437.

² *Abraham v. Nunn*, 42 Ala. 51; *Smith v. Frost*, 51 Ga. 336; *Waller v. Parker*, 5 Coldw. 476; *Yale v. Oliver*, 21 La. Ann. 454.

the mischief.¹ Loss by fire, burglary, robbery, and theft give rise to similar considerations, though less likely to afford a positive excuse; and the bailee's good faith and due diligence have especial reference to precautionary measures, repelling force, and seeking to make the loss from any such cause as light as possible.² Ordinary diligence is a question of fact, in every case, to be determined upon all the circumstances. For such injury as resulted directly from the bailee's negligence, the bailee must respond, notwithstanding an accident afterwards occurs which must, in any event, have ruined the thing;³ while, on the other hand, his act of carelessness, which in no wise occasioned the disaster, does not make him answerable.⁴ In short, the doctrine of proximate and remote cause here applies; with, however, much favor to any bailee who can establish, on his behalf, that the loss or injury occurred under circumstances which naturally impute no blame to the man of average care and diligence; and subject, of course, to the general maxim, that the party who charges culpable negligence has the burden of proof.⁵

§ 102. **Elements which qualify one's Liability in such Cases.**

—The line of the hired bailee's duty bends, somewhat, to the stress of local custom, the nature and qualities of the thing

¹ *Leck v. Maestaer*, 1 Camp. 138; *Smith v. Meegan*, 22 Mo. 150; *Jones v. Greenwood*, 20 La. Ann. 297; *McMahon v. Field*, 7 Q. B. D. 591; *Merchants' Trans. Co. v. Story*, 50 Md. 4; *Lilley v. Doubleday*, 7 Q. B. D. 510; *White v. Colorado Central R.*, 3 McCr. 559; *Wilson v. Southern Pacific R.*, 62 Cal. 164.

² *Story Bailm.* § 444; *Platt v. Hibbard*, 7 Cow. 497; *Schmidt v. Blood*, 9 Wend. 268; *Chenoweth v. Dickinson*, 8 B. Monr. 156; 45 N. Y. Super. 245; *Clafin v. Meyer*, 75 N. Y. 260.

³ *Powers v. Mitchell*, 3 Hill, 545; *Francis v. Castleman*, 4 Bibb, 282; *Clafin v. Meyer*, 43 N. Y. Super. 1; *Story Bailm.* § 450 *a*.

⁴ *Gibson v. Hatchett*, 24 Ala. 201. Courts are indisposed to treat mere detention as the proximate cause where damage is occasioned by some extraordinary and unforeseen accident. *Jones v. Gilmore*, 91 Penn. St. 310; *The Francesca*, 9 Ben. 34. And see *post*, Part VI., c. 4.

⁵ *Supra*, § 23; *Clafin v. Meyer*, 75 N. Y. 260; 62 Cal. 164.

itself, and the peculiar bailment methods sanctioned by prudent men of his class towards such property from time to time; for all this bears upon that mutual intent which bailment law would compass. Safe-depositaries must use secure locks, and set a watch, where, in the case of cattle-keepers, it would be unnecessary; and for warehousing inflammable substances, extra precautions must be taken by the warehouseman.¹ In the place, as well as the method of storage, ordinary care should be taken according to the circumstances.²

But one who intrusts his chattels to another, knowing plainly how and where the bailee will keep them, is chargeable accordingly, and not by a theoretical standard; though this is an exception to be cautiously stated. Thus, where storage was in a certain building, of whose fitness the bailor was enabled to judge for himself, it was held that the bailee's liability could not be extended because of some defect of construction imputable to the builder and unknown to the bailee.³ So where loss occurred from exposure in a place which the bailor had sanctioned from a long course of dealing, the bailee's ordinary care was measured accordingly.⁴

§ 103. **Ordinary Care and Diligence illustrated.** — To cite a few general examples in point, most of which relate to hired custody; since cases of hired work upon a thing are seldom discussed under the head of bailments, while hired carriage usually relates to the vocation of common carrier. One warehouseman was held responsible for the bad storage of cotton, who, receiving it in torn and rotten bales, left it on an open lot of ground, so exposed that the under bales sank

¹ See *Vincent v. Rather*, 31 Tex. 77; *Hamilton v. Elstner*, 24 La. Ann. 455.

² *Moulton v. Phillips*, 10 R. I. 218; *Brown v. Hitchcock*, 28 Vt. 452; *Chenoweth v. Dickinson*, 8 B. Monr. 156; *Cowles v. Pointer*, 26 Miss. 253; *Hatchett v. Gibson*, 13 Ala. 587; *Jones v. Hatchett*, 14 Ala. 743.

³ *Searle v. Laverick*, L. R. 9 Q. B. 122. And see *Shaw, C. J.*, in *Whitney v. Lee*, 8 Met. 91; *Knowles v. Atlantic R.*, 38 Me. 55.

⁴ *Kelton v. Taylor*, 11 Lea, 264.

into the mud;¹ and another, for insufficiently protecting against thieves, whose premises were so negligently secured and watched that some fifty barrels of salt a week were rolled out and carried off by depredators, until some two hundred and fifty were missing.² An agistor has been found wanting in ordinary diligence who turns a colt into a field accessible to a bull, though unaware of the bull's vicious disposition;³ or where he leaves gates carelessly open, or imprudently suffers the stable, at night, to be entered by strangers.⁴ The loss of his customer's watch has been visited upon a watchmaker hired to repair it, who failed to secure it at night against the light-fingered of his own household, while secret- ing his own stock in trade very carefully.⁵ And a jury was recently permitted to find a safe-deposit company negligent, under the rule, for failing to keep adequate guard over a safe rented by one of its depositors, from which valuable bonds were missing.⁶

Where the bailed goods are injured by rats or other vermin, the question is, whether the bailee was ordinarily prudent, under all the circumstances, in trying to protect the property against such ravage.⁷ As to losses by accidental fire, such a bailee would commonly stand exonerated;⁸ though he might be held, where the evidence showed that he was remiss, either

¹ *Morehead v. Brown*, 6 Jones L. 367.

² *Chenowith v. Dickinson*, 8 B. Monr. 156.

³ *Smith v. Cook*, 1 Q. B. D. 79.

⁴ *Story Bailm.* § 443; *Swann v. Brown*, 6 Jones L. 150.

⁵ *Clarke v. Earnshaw*, 1 Gow, 30. And see *Halyard v. Dechelman*, 29 Mo. 459.

⁶ *Safe-Deposit Co. v. Pollock*, 85 Penn. St. 391.

⁷ *Cailiff v. Danvers*, Peake, 114; *White v. Humphery*, 11 Q. B. 43; *Story Bailm.* §§ 408, 444; *Taylor v. Secrist*, 2 Disney (Ohio), 299. And see *Penobscot Boom Co. v. Baker*, 16 Me. 233.

⁸ See *Sidaways v. Todd*, 2 Stark. 400; *Norway Plains Co. v. Boston & Maine R.*, 1 Gray, 263; *Francis v. Dubuque R.*, 25 Iowa, 60; *McCullom v. Porter*, 17 La. Ann. 89; *Francis v. Castleman*, 4 Bibb, 282; *Russell v. Koehler*, 66 Ill. 459. As to U. S. bonded warehouses, see *Macklin v. Frazier*, 9 Bush, 3.

in causing the fire,¹ or suffering it to reach the bailed goods ; as if, for instance, he ought to have stored them in a fire-proof room, and failed to do so ;² or where he exposed them near some explosive substance.³

§ 104. **Element of Skill considered ; Hired Work upon a Thing.** — Ascending from hired custody to hired service of the more active sorts, we find that combined knowledge and dexterity in a particular practice, which is denominated skill, more nearly indispensable. Even from custodians, it is true, may be exacted, in many instances, a certain skill or expertness, which owners are not likely to disregard, as in the instances of those who winter horses or store perishable fruits or explosives.⁴ But it is more clearly in the hire of work upon a chattel that the consideration of skill avails ; and here, though our standard of ordinary diligence still applies, it is more likely to vary, and the compensation as well, according to the delicacy and difficulty of the work, and the workman's training, habits, experience, and reputation for the particular kind of undertakings. For careless custody, he must respond,⁵ of course ; but the main undertaking rises in plane until, in the case of some famous sculptor or painter, such a degree of ability to do the service may be engaged and paid for, that, if we averaged mankind in the mass, instead of by classes or professions, the skill should be pronounced not ordinary, but extraordinary. Such extreme cases, however, are, under the

¹ *Wilson v. Southern Pacific R.*, 62 Cal. 164, where the careless use of kerosene caused the fire.

² *Hatchett v. Gibson*, 13 Ala. 587 ; *Vincent v. Rather*, 31 Tex. 77. And see *McGinn v. Butler*, 31 Iowa, 160.

³ *White v. Colorado Central R.*, 3 McCr. 559. Here the bailor's goods were stored in a wooden building, with a lot of gunpowder near the door, so that the firemen were afraid to enter the building.

⁴ See, too, as to "floating warehouses," *Hamilton v. Elstner*, 24 La. Ann. 455.

⁵ See, *e.g.*, *Leck v. Maestaer*, 1 Camp. 138 ; *Clarke v. Earnshaw*, 1 Gow, 30 ; *Wallace v. Canaday*, 4 Sneed, 364 (the case of a public miller) ; *Russell v. Koehler*, 66 Ill. 459 ; *Halyard v. Dechelman*, 29 Mo. 459.

strict law of bailment, seldom found; and the skill to be contemplated, like diligence in general, primarily refers to particular occupations, to men of average prudence in the particular class or calling. By ordinary skill as well as diligence, we here denote that skill or diligence which prudent local workmen, of the same class, are wont to bestow upon similar undertakings. Pursuits themselves imply, in the universal sense, a difference of skill; for one piece of wood may be bailed for a collier to reduce to charcoal, and another for some artist to carve into an image of beauty. And as we rise from artisan to artist, the choice, the class itself, narrows, until the bailment employment is from a set of men so narrow that the choice is governed by individual or group, rather than by class considerations at all. The agreed compensation, large or small, is, in this respect, an important fact for evidence.¹

Through the whole gamut of hired occupation we shall find these rules claiming recognition: 1. That ordinary skill in the vocation he assumes is expected from every one assuming to be a bailee in that vocation. 2. That, for failure to exercise such ordinary skill, he will be decreed at default as for want of ordinary diligence.²

§ 105. **The same Subject.**—Yet the conduct of the bailment parties may not quite consist with such an undertaking, so that the rules and presumptions are pushed aside. One's contributory negligence debars him from holding another responsible where loss occurs. Thus, should the bailor supersede plainly the bailee's discretion, and insist that his own

¹ See Story Bailm. §§ 429-433.

² 2 Kent Com. 588; Story Bailm. § 431; Pothier Contrat de Louage, n. 425-428. Two civil-law maxims are: *Spondet peritiam artis: imperitia culpa adnumeratur.* Ib. And see *Coggs v. Bernard*, 2 Ld. Raym. 909; *Money Penny v. Hartland*, 2 C. & P. 378; *Duncan v. Blundell*, 3 Stark. 6; *Gamber v. Wolaver*, 1 W. & S. 60; *Kuehn v. Wilson*, 13 Wis. 104; *Hillyard v. Crabtree*, 11 Tex. 264; *Francis v. Shrader*, 67 Ill. 272; *Smith v. Meegan*, 22 Mo. 150.

poor plan be followed, he must bear the consequences.¹ Nor does skill in one's own vocation import skill in another man's; and the sick man who takes his potion from a horse-doctor has only his own folly to blame if he is made worse.² Nor, again, as it would appear, can a bailor so utterly disregard his personal knowledge of the bailee's habits, character, and means of performance, as to hold him for unskilfully doing a delicate piece of work which he did as well as might fairly have been expected, and without falsely pretending that he could do better.³ And circumstances might sometimes show that one was employed, not to do as well as the average of his class, but for individual qualities, to be tested by the skill which, as an individual, he was wont to exercise upon such work.⁴ For, keeping within the bounds of public policy, our general aim is to ascertain what the parties mutually expected or had a right to expect in the particular case.

§ 106. **Special Contract Terms should be considered.** — With a view of getting still closer to the mutual intent of the transaction, we must regard all special and permissible stipulations entered into by the parties to the bailment. Whatever lawful terms may have been introduced by their contract, for the purpose of qualifying the method or risk of performance, should be given full force, whether expressly set forth or only implied;⁵ a rule similar to what we have elsewhere considered, which may tend to increase or decrease the liability. A warehouseman's receipt, brought to his customer's knowledge, would go far towards explaining the true nature and extent of his undertaking;⁶ and, in general, the bailor's special directions, or the bailee's explicit announcement of his modes of doing such business, or published proposals,

¹ *Duncan v. Blundell*, 3 Stark. 6, per Bayley, J.

² Story Bailm. §§ 433-435; Jones Bailm. 99, 100.

³ *Ib.*

⁴ *Supra*, § 36.

⁵ Story Bailm. § 440; Pothier Contrat de Louage, n. 433; *supra*, § 20; *Thomas v. Cummiskey* (Penn.), 19 Rep. 633.

⁶ See *Hatchett v. Gibson*, 13 Ala. 587; *Patten v. Baggs*, 43 Ga. 167.

advertisements, and letters of either party might, if known and acted upon, control interpretation as much as any written and signed indenture. But to this, public policy sets limits.

The bailee's breach of contract as to the place or manner of performance, so as to increase the exposure of the property to danger, enlarges his own risk under the doctrine of proximate and remote cause. Thus an agistor who undertakes to stable a horse and then turns him out into the yard, may be held liable if the animal catches cold.¹ And a warehouseman who contracts to store goods at a particular place and then stores them somewhere else without his customer's knowledge, whereby the benefit of insurance is lost, is answerable if the goods are destroyed by fire.² On the other hand, if directed by his bailor to perform without regard to the weather, the bailee may assume that the bailor takes the risk of such exposure, and act accordingly.³

§ 107. **Honesty and Good Faith requisite.**—Not only must fraud be absent from the bailment contract itself, but the bailment accomplishment should be attended with reciprocal good faith. An honest bailee for hired service will not attempt to sell or appropriate what he holds in bailment, nor falsely pretend to skill or opportunity which he does not possess;⁴ and, as a rule, no unauthorized sale by the bailee will alter the bailor's general property, so as to divest him of the right to sue for its recovery the bailee, the purchaser, or any one claiming under the transfer.⁵ On the other hand, if the bailor has fraudulently duped his bailee

¹ *McMahon v. Field*, 7 Q. B. D. 591.

² *Lilley v. Doubleday*, 7 Q. B. D. 510.

³ *Brandon v. Gulf City Man. Co.*, 51 Tex. 121.

⁴ *Story Bailm.* § 440; *Davis v. Bigler*, 62 Penn. St. 242; *Calhoun v. Thompson*, 56 Ala. 166; 61 Cal. 405; *Whitlock v. Heard*, 13 Ala. 776; *Stephenson v. Price*, 30 Tex. 715. But as to rightfully assigning one's mere interest as bailee, see *Nash v. Mosher*, 19 Wend. 431; *Bailey v. Colby*, 34 N. H. 29.

⁵ See *Calhoun v. Thompson*, 56 Ala. 166, which allows trover to be brought. Cf. *supra*, § 17.

into the undertaking, the latter may, it is held, after discovering the fraud practised upon him, go on and perform the work, deferring indemnity to the termination of his service.¹

§ 108. **Rule of Agency applied.** — Our present bailment calls for frequent application of the rules of agency. Thus, the safe-deposit and warehouse business is often transacted by chartered companies; wharves, too, in this country are chiefly erected by municipalities or private corporations, empowered under some government franchise;² and the legislature, in such cases, exercises much supervision as to tolls, charges, and the like.³ Individual workmen, too, and unchartered associates, who are masters of their craft, constantly employ sub-agents and inferiors; and indeed sculptors and other artists, of whom jurists were wont to assert that the genius, talent, and skill of the individual are so specially engaged that he cannot put another in his stead, will fashion the model or sketch the pattern, and then set men of meaner abilities to do the detail work.⁴

In general, a hired bailee must respond for the negligent and unskilful work of his own servants or sub-agents about the thing just as though his own want of ordinary diligence and skill, not theirs, had caused the damage; for their privity is with him and not the bailor; and so, too, it is to him, and not the bailor, that they should respond for their carelessness.⁵

¹ *Parker v. Marquis*, 64 Mo. 38; *supra*, § 17. And see as to criminal accountability, *Hutchinson v. Commonwealth*, 82 Penn. St. 472; *Phelps v. People*, 72 N. Y. 334.

² U. S. Dig. 1st series, Wharves, 1-19; *Wiswall v. Hall*, 3 Paige, 313; *Commonwealth v. Alger*, 7 Cush. 53; *Jeffersonville v. Louisville Ferry Co.*, 27 Ind. 100; *Morris, &c. Co. v. Central R.*, 16 N. J. Eq. 419; 9 Ben. 34, 507.

³ *Ib.*

⁴ See *Story Bailm.* § 428; *Pothier Contrat de Louage*, n. 420, 421.

⁵ *Blake v. Kimball*, 106 Mass. 115; *Schoul. Dom. Rel.* § 489; *Stevens v. Boston & Maine R.*, 1 Gray, 277; *Macklin v. Frazier*, 9 Bush, 3. The bailee may sue his sub-bailee for negligent performance causing him damage. *McGill v. Monette*, 37 Ala. 49.

But where, with the knowledge and privity of his bailor, the hired bailee employs another to aid in the work, by whose want of ordinary diligence and skill the thing is injured, the bailor may sue such party.¹ The hired bailee must have used ordinary diligence in the choice and continuous employment of any subordinate who commits theft or other wanton offence wholly outside the obvious scope of his sub-agent, since otherwise he is himself responsible therefor; and, of course, he should be personally innocent of the offence.² But an agency has its limits: thus, a servant employed during fixed hours in the day, or for certain days, is not, without the bailee's consent, his servant at night, or on other casual occasions, when unemployed.³

§ 109. **Liability of Bailee to Third Persons.** — A bailee may be liable to third persons for injuries occasioned by the property in his temporary possession. Thus, an agistor has been held suable for the trespasses committed by cattle in his charge.⁴

§ 110. **Right of Hired Bailee to Undisturbed Possession.** — The hired bailee has rights as well as duties. First, as against his bailor and all having no paramount title, he has the right to an undisturbed possession of the chattel, pending the proper accomplishment of the bailment purpose.

§ 111. **Right of Compensation considered.** — Next, the bailee has also the right to demand suitable compensation; which may either have been fixed in advance, or left, as something just and reasonable, for later computation. Custom, a special understanding, or the spirit of the engagement may establish this compensation, as something to be rendered at the outset,

¹ *Baird v. Daly*, 57 N. Y. 236.

² *Clarke v. Earushaw*, 1 Gow. 30. This subject is chiefly discussed by the courts in analogous cases.

³ *Aldrich v. Boston & Worcester R.*, 100 Mass. 31, where servants of a warehouseman came on the premises at night while the warehouse was burning, as individuals or citizens.

⁴ *Weymouth v. Gile*, 72 Me. 446.

or by periodical instalments, or when the work is fully completed; but, in most bailment undertakings, the third is the presumable arrangement.

Compensation may be awarded differently, according as the service upon the chattel has been: (1) left incomplete; (2) or bestowed differently from what was mutually intended; (3) or completely bestowed in accordance with the mutual intention. The doctrine for the two former cases is not readily reduced to rule; but the two inquiries of chief pertinence appear to be, whether blame attaches, in fact, to either party, and how far a mutual understanding may have regulated the particular case. Let us, however, glance at the three cases separately.

1. Where the bailee's service has been left incomplete. According to Pothier, should the thing accidentally perish, without default of the workman, *res perit domino*; and the owner not only loses his chattel, but must compensate the workman for what he has done, and, besides (provided this was intended as a special item), the materials furnished.¹ This is the rule of universal law, and a hard one, indeed, for the bailor.² But local usage or special contract might create exceptions; for were it mutually understood that the workman should perform by the job for some stipulated price, payable only upon completion of the service, the civil law and our own would, in case of a calamity for which neither party was to blame, make the thing perish to the master and the service to the workman; unless, indeed, the calamity occurred after the job was actually finished.³ In point of fact, as Judge Story has remarked, the modern Code of France, to which that of Louisiana in this respect conforms, shows a

¹ Pothier Contrat de Louage, n. 433; Story Bailm. § 426.

² Story Bailm. §§ 426, 426 a; 2 Kent Com. 591; Menetone v. Athawes, 3 Burr. 1592; Gillett v. Mawman, 1 Taunt. 137; Wilson v. Knott, 3 Humph. 473.

³ Story Bailm. § 426 a, b; 2 Kent Com. 591 n.; Appleby v. Myers, L. R. 2 C. P. 651; Brumby v. Smith, 3 Ala. 123.

disposition to thus apportion the loss, so that neither workman nor employer can recover one against the other, wherever both were blameless and the loss accidental.¹ We may not inconsistently add, that, if the workman had agreed to furnish all or the principal materials himself, he would have to lose both work and materials; his position not being that of bailee at all.²

Where, however, the bailor was at fault in occasioning the loss, he must not only render the bailee full compensation, but bear the loss on his own part; and he might have to respond further in punitive damages, if, for instance, he handed over a dangerous article, to have service performed upon it, concealing its hurtful qualities, and so accomplishing mischief.³ But if the bailee were at fault, as in performing his service with less than ordinary care and diligence, whereby the loss occurred, then he should respond for loss of the thing, and forfeit, as it would seem, his claim to compensation, or, at all events, put his bailor where he would have been with the whole service properly performed.⁴ The foregoing considerations generally appear applicable to losses by abstraction of the thing, as well as losses by its destruction.⁵

Where the hired bailee has simply left the service unfinished, he ought, if in default, to expect no compensation for his work;⁶ or, at most, nothing — provided the default was not wilful, and he worked by the day, instead of by the

¹ Civil Code of Louisiana, art. 2731; Civil Code of France, 1788-1790; 2 Kent Com. 591; Story Bailm. § 427.

² *Appleby v. Myers*, L. R. 2 C. P. 651; *McConihe v. New York R.*, 20 N. Y. 495; *supra*, § 99.

³ See *Blakemore v. Bristol R.*, 8 E. & B. 1035, per Coleridge, J.; *McCarthy v. Young*, 6 H. & N. 329.

⁴ *Smith v. Meegan*, 22 Mo. 150; *Powers v. Mitchell*, 3 Hill, 545.

⁵ See *Jones v. Greenwood*, 20 La. Ann. 297.

⁶ Story Bailm. § 441; *Sinclair v. Bowles*, 9 B. & C. 92; *Faxon v. Mansfield*, 2 Mass. 147.

piece — beyond such compensation, *pro rata*, as might remain after deducting all damage so occasioned the employer.¹ Wherever, indeed, the default imputes no real misconduct to the bailee, and the bailor has, on the whole, received a substantial benefit from the service, our courts incline to allow the former his full compensation, less the special damage to which the latter may be put in getting his work finished elsewhere ;² not, however, unless the express or implied terms of the engagement will bear such construction.³ If the service be left incomplete, because of wrongful interference or some default of duty on the bailor's part, the bailee may, in general, demand full indemnity under the engagement.⁴

§ 112. **The same Subject.** — 2. Where the service upon the chattel has been bestowed differently from what was mutually intended, there might or might not be a right of compensation according to the circumstances. If the fault could well be laid at the bailor's door, the bailee ought to have his *quantum meruit* ; and for an employer's negligence or misconduct the workman has his own claim for damages.⁵ But the bailee's deviation from his engagement deprives him of compensation, besides exposing him to a suit for damages, provided such deviation works a real injury to the bailor ; but if the bailment prove, notwithstanding, beneficial, on the whole, to the bailor, compensation, less the special damage, would be recoverable ;⁶ and for deviation, only as to the time of accomplishment, in which respect the best workmen may be at fault, compensation less the damage caused

¹ *Ib.*

² *Hillyard v. Crabtree*, 11 Tex. 264 ; 2 Smith Lead. Cas. 43, 45.

³ *Story Bailm.* § 441 *a* ; *Ellis v. Hamlen*, 3 Taunt. 52 ; *Jennings v. Camp*, 13 Johns. 95 ; *Appleby v. Myers*, L. R. 2 C. P. 651, 656.

⁴ *Story Bailm.* § 441.

⁵ 2 Smith Lead. Cas. 43 ; *Blackburn, J.*, in *Appleby v. Myers*, L. R. 2 C. P. 651, 659 ; *Story Bailm.* § 441 *b*.

⁶ *Basten v. Butler*, 7 East, 479 ; 2 Smith Lead. Cas. 32, 42 ; *Hillyard v. Crabtree*, 11 Tex. 264.

by delay.¹ The use of better materials than were called for, or the bestowal of better work, affords the bailee no ground for claiming extra remuneration, unless, of course, the bailor had plainly assented to the deviation by way of mutually changing the original engagement.²

For breach of hired service, as under the general law of contracts, the fundamental principle is, to award the injured party such amount, by way of damages, as will make him whole under the engagement; which, in the present instance, may be estimated by setting off against the intended recompense such damage as the bailor may have suffered by reason of his bailee's incomplete or faulty performance.³ We find, too, that in the *quasi* bailment of salvage, the salvor's want of diligence is recognized as good reason for reducing the salvage compensation, and that a salving vessel's claim for recompense may be partially or fully offset by the salvaged vessel's claim of damage resulting from its negligence.⁴ Subject to the general policy of our law, this whole matter of damages is of course controllable by the express mutual stipulation of the bailment parties.

§ 113. **The same Subject.** — 3. Where the hired service has been completely bestowed according to the mutual intention, the bailee, of course, becomes entitled to his full compensation, save so far as adjustment may have been made earlier.⁵ Under such circumstances, and where one has exercised that good faith and ordinary skill in performance which

¹ Story Bailm. §§ 428, 441 *b*; Trent Co. *in re*, L. R. 4 Ch. 112; Merrill v. Ithaca R., 16 Wend. 585.

² Story Bailm. § 441 *c*; Dermott v. Jones, 2 Wall. 1.

³ See 2 Kent Com. 509, 590. And see Cutler v. Powell, 6 T. R. 320; S. C. 2 Smith Lead. Cas. 1, Hare & Wallace's notes, for an ample discussion of the general rule of damages.

⁴ See Brightly Fed. Dig. Salvage, VII.; Peisch v. Ware, 4 Cranch, 347; The Butler, L. R. 4 Ad. & Ecc. 178; The Paint, 2 Ben. (U. S.), 174.

⁵ Story Bailm. § 425; Garrard v. Moody, 48 Ga. 96.

satisfies the justice of the case, the bailee's claim of recompense is favorably regarded. Even a finder on land, who by the stern rule of law can claim no reward, may thus gain whatever the loser, by public advertisement or otherwise, may have specifically offered for the service.¹

§ 114. **How Expenses shall be borne.**—The evident understanding of the parties must ultimately determine whether such incidental expenses as the hired bailee may have incurred while performing his service—as, for instance, the cost of fodder for a stabled horse, or of materials to repair a coach—shall be specially reimbursed; but usually the hired bailee is understood to bear such incidental expenses, placing the rate of compensation high enough to make him whole.² Doubtless, in an extreme and unforeseen emergency, the hired bailee may, in pursuance of his duty, make expenditure for the preservation of the thing at his bailor's cost;³ but his more prudent course will be to obtain the latter's consent in advance, where he has opportunity. And so desirable is this course, that his right to impose a lien as against the owner, in favor of a third person who does work upon the thing, has been denied, where the owner and original bailor was known but never consulted.⁴

§ 115. **Hired Bailee may sue for Dispossession, etc.**—A hired bailee has the right to sue any third party who interferes with his lawful possession, and, in general, may bring trover, and such other actions (including replevin) as are founded in

¹ *Nicholson v. Chapman*, 2 H. Bl. 254; *Wentworth v. Day*, 3 Met. 352; *Cummings v. Gann*, 52 Penn. St. 481. See *Wilson v. Guyton*, 8 Gill, 213.

² Story Bailm. §§ 425, 426, 441; 2 Kent Com. 590; Pothier Contrat de Louage, n. 405–417; *Whitlock v. Heard*, 13 Ala. 776; *Menetone v. Athawes*, 3 Burr. 1592. As to expenses incurred through the bailee's fault. see *Jones v. Morgan*, 90 N. Y. 4.

³ See Story Bailm. § 426 c, which shows that such was the Roman law.

⁴ *Small v. Robinson*, 69 Me. 425, citing *Gilson v. Gwinn*, 107 Mass. 126. In this Maine case the rule is broadly stated; but the facts showed that the third person knew of the real owner's title and that such owner's sanction was not given to the work. And see 19 Pick. 228.

the tort. For, if a gratuitous bailee has this right, much more should it be conceded to one whose possession is coupled with a valuable interest.¹ Bailees, too, of a barge which is injured by collision, have been allowed, in admiralty, to sue the offending vessel *in rem*: the decree being so framed as to secure respondents against further liability to the general owner.² True, it is held that the hired bailee's interest does not permit of his suing, for loss, a common carrier to whom, after finishing his service, he has delivered the thing;³ but this is, doubtless, on the assumption that he has parted with his lien.⁴ The bailor himself cannot, by connivance with a stranger, in violation of his own obligations, enable the latter, of right, to put the hired bailee out of possession.⁵ In fine, whatever the bailor's own right of action against third persons, under the circumstances, any bailee of a thing, with a valuable interest therein, may sue others in his own name for injury done to it, whether tortwise, or for breach of contract obligation.⁶

§ 116. **Whether Hired Bailee should insure.** — Hired bailees are not bound to insure the chattels in their keeping, independently of some special undertaking so to do.⁷ But the hired bailee's special property is here of such value as entitles him, if he so desire, to cover the risk of fire by a policy to the suitable amount;⁸ and thus is it with lien creditors

¹ *Supra*, §§ 22, 54; *Sutton v. Buck*, 2 Taunt. 302; *Raynor v. Chiles*, 2 F. & F. 775; *Eaton v. Lynde*, 15 Mass. 242; *Shaw v. Kaler*, 106 Mass. 418; *Burdiet v. Murray*, 3 Vt. 302; *Story Bailm.* §§ 422 *a*, 443; *Hare v. Fuller*, 7 Ala. 717; *Cox v. Easley*, 11 Ala. 362; *White v. Bascom*, 28 Vt. 268; *Hopper v. Miller*, 76 N. C. 402; *Harvey v. Terre Haute R.*, 74 Mo. 538.

² *The Minna*, L. R. 2 Ad. & Ecc. 97.

³ *Morse v. Androscoggin R.*, 39 Me. 285.

⁴ See *post*, § 122, as to the hired bailee's lien.

⁵ *Burdiet v. Murray*, 3 Vt. 302.

⁶ See *Redfield, C. J.*, in *White v. Bascom*, 28 Vt. 268.

⁷ *Story Bailm.* § 456.

⁸ *Lucena v. Craufurd*, 1 Taunt. 325; *Deforest v. Fulton Ins. Co.*, 1 Hall, 84.

generally.¹ Should he recover on the policy for the whole value of the goods, the bailee holds the balance, in excess of his own claim, as trustee for the bailor or owner.² Warehousemen and wharfingers in the course of business frequently insure the goods which pass through their hands, so as to keep up a floating policy for the protection of customers, and the security of their own charges.³ An attaching officer, in like manner, may insure the goods for which he stands responsible.⁴ Any bailee who agrees with his bailor that the bailed goods shall be covered by his own policy extends, of course, his liability accordingly.⁵

§ 117. **Termination of Bailment; Redelivery or Delivery over.**—III. Termination of the bailment. The bailment for hired services about a chattel may either be interrupted from some cause, or carried to its close; but in the natural course it continues until the fixed period, or, it may be, a reasonable time, has elapsed for its full accomplishment.⁶ The main duty of the hired bailee, when his bailment terminates, is to make delivery of the thing back or over in suitable order; and that of the bailor is to render the final compensation; but to know the correlation of these duties, in a given case, is of some consequence; so, too, is it to know the exact point at which delivery back or over is complete.

¹ Protection Ins. Co. v. Hall, 15 B. Mon. 411; Flanders Fire Ins., 342-344; Sun Fire Office Co. v. Wright, 3 Nev. & M. 819; Carter v. Humboldt Ins. Co., 12 Iowa. 287; Siter v. Morris, 13 Penn. St. 218; Insurance Co. v. Chase, 5 Wall. 513.

² Hough v. People's Ins. Co., 36 Md. 398; Waters v. Monarch Assurance Co., 5 E. & B., 870.

³ *Ib.*; Johnson v. Campbell, 120 Mass. 449; Flanders Fire Ins., 344.

⁴ White v. Madison, 26 N. Y. 117. "By the law of insurance, any person has an insurable interest in property, by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has or has not any title in, or lien upon, or possession of the property itself." Gray, J., in *Eastern R. v. Relief Fire Ins. Co.*, 98 Mass. 420, 423. And see *Wilson v. Jones*, L. R. 2 Ex. 150, 151.

⁵ *Thomas v. Cumiskey* (Penn.), 19 Rep. 633; *supra*, § 106.

⁶ See *Felton v. Hales*, 67 N. C. 107.

Every hired bailee is bound to deliver to the bailor, or his order, or to such third person as may mutually have been agreed upon. He will be justified in delivering to an agent of the bailor for such dealings, whose revocation of authority has not been brought to his knowledge.¹ With warehousemen and wharfingers, it is not an uncommon business usage to give, at the outset, a delivery-order or receipt, whose transferee will be presumptively entitled to the thing;² since goods are constantly sold while thus in store, and advances made upon them, on the faith of such documents. The effect of such orders as documents of title, like bills of lading, is not clearly settled; nor do our States harmonize in policy with regard to the effect of their indorsement and delivery in establishing title.³ Apart from usage or statute, and in absence of adverse notice, the warehouseman is safe in transferring possession according to the directions of the person from whom he received the goods.⁴ But, in general, if the

¹ *Reamer v. Davis*, 85 Ind. 201.

But where the bailor has ordered the bailee to deliver to no one except on a written order, the bailee ought not to deliver otherwise, not even to the bailor's wife. *Kowing v. Manly*, 49 N. Y. 192.

² *Patten v. Baggs*, 43 Ga. 167; U. S. Dig. 1st series, Warehousemen, 3-11; *Benj. Sales*, Bk. 5, pt. 1, c. 4; 2 *Schoul. Pers. Prop.* §§ 393, 539; *Parker v. Lombard*, 100 Mass. 405, 408; *Cochran v. Ripy*, 13 Bush, 495.

³ By the older and more conservative rule, the transfer of a warehouse receipt was treated as constituting no constructive delivery of the goods, until the warehouseman was notified and agreed to hold for the transferee. Such seems to have been the current English opinion until Parliament interfered. But see *Benj. Sales*, §§ 174-176, 815. Massachusetts still favors this rule. *Hallgarten v. Oldham*, 135 Mass. 1. But in many States the disposition is to treat warehouse receipts like bills of lading, thus making the holder by indorsement the proper party to receive the property. *Durr v. Hervey*, 44 Ark. 301; *Allen v. Maury*, 66 Ala. 10; *Davis v. Russell*, 52 Cal. 611.

Warehouse receipts, though "negotiable" in a certain sense under local statute, have not the full character of negotiable paper. Thus, the warehouseman is no guarantor of the title to property placed in his custody. *Insurance Co. v. Kiger*, 103 U. S. 352.

⁴ *Hoar, J.*, in *Parker v. Lombard*, 100 Mass. 405.

bailee deliver to the wrong party, although innocently, he renders himself liable, as for conversion of the thing;¹ while, on the other hand, he is justified in delivering to the right party.²

§ 118. **Delivery to Paramount Owner; Adverse Claims, etc.**—As in other cases of bailment, the bailee's obligation to honor his bailor's title is so great that he cannot, upon any pretext, seek his advantage by disputing it, nor set up that of another, by way of excusing the redelivery according to his engagement, when he can so redeliver without peril.³ He cannot set up a third person's superior title without such person's knowledge and authority.⁴ But, as the obligation is stronger to restore to a rightful owner what is lawfully demanded,⁵ and self-protection is always justifiable, our bailee may not only take time to make proper inquiry, but may, by reasonable means, as by a bill of interpleader, guard himself from active litigation when adverse claims are brought to his knowledge, which he cannot with safety disregard, and the true title is really in doubt.⁶ And this is but prudence on his part; for if, when in a strait between claimants to the thing, he makes himself an active party to the controversy,

¹ *Lubbock v. Inglis*, 1 Stark. 104; *Coles v. Clark*, 3 Cush. 399; *Parker v. Lombard*, 100 Mass. 405; 4 Barb. 361; *Stephenson v. Price*, 30 Tex. 715; *Jeffersonville R. v. White*, 6 Bush, 251; *Dufour v. Mephram*, 31 Mo. 577; *Alabama R. v. Kidd*, 35 Ala. 209; *McGinn v. Butler*, 31 Iowa, 160; *Story Bailm.* § 450; *Oswego Bank v. Doyle*, 91 N. Y. 32.

² *Mortimore v. Ragsdale*, 62 Miss. 86. This subject is amplified under the head of Common Carriers, *post*, Part VI., c. 6.

³ *Story Bailm.* § 450; *Biddle v. Bond*, 6 B. & S. 225; *Butler v. Kenner*, 14 Mart. 274; *Britton v. Aymar*, 23 La. Ann. 63; *Maxwell v. Hous-ton*, 67 N. C. 305; *Peebles v. Farrar*, 73 N. C. 342; *Foltz v. Stevens*, 54 Ill. 180; *Estes v. Boothe*, 20 Ark. 583.

⁴ The bailee may show that the bailor has transferred title to another who has notified him accordingly. *Robert v. Noyes*, 76 Me. 590.

⁵ *Dodge v. Meyer*, 61 Cal. 405.

⁶ *Biddle v. Bond*, *supra*; *Wilson v. Anderton*, 1 B. & Ad. 450; *Rogers v. Weir*, 34 N. Y. 63; *Ball v. Liney*, 48 N. Y. 6; *Kelly v. Patchell*, 5 W Va. 585; *Roberts v. Yarboro*, 41 Tex. 449.

instead of remaining neutral, he must stand or fall by the title he sets up, though it be that of the party from whom he received possession.¹ We have seen that where forcibly dispossessed, notwithstanding his good faith and ordinary diligence, he becomes absolved from the duty of delivery back or over; and so is it when the dispossession was by legal proceedings which he gave his bailor full opportunity to defend, or otherwise resisted honestly and diligently.² On the other hand, if the bailee surrenders under a judgment by default, without giving his bailor opportunity to defend, he runs the risk of surrendering to the real owner.³ Claimants who do not appear until after the bailee has redelivered to his bailor cannot, of course, hold him liable.⁴

So strictly is the bailee bound to honor his bailor's title and become a bailment party on no other footing, that if he accepts the bailment with full knowledge of an adverse claim he cannot set up that claim afterwards as against his bailor.⁵

§ 119. **Delivery over, on a Change of Owners.** — Where the bailed chattel has been sold, and the bailee is duly notified thereof, he holds it under a transfer of title which he and all others are bound to regard.⁶ And, if the bailee attorns to the new purchaser in such manner as warrants the title for good consideration to such purchaser, he is estopped from setting up *jus tertii* against him afterwards.⁷ Nor can a bailee, who takes goods subject to prior charges, assume, after

¹ *Ib.* While a bond of indemnity may be useful in case of conflict, the warehouseman cannot insist upon it; but he may interplead. 45 N. Y. Super. 423.

² *Biddle v. Bond*, 6 B. & S. 225, per Blackburn, J.; *Cook v. Holt*, 48 N. Y. 275; *Burton v. Wilkinson*, 18 Vt. 186; *Mortimore v. Ragsdale*, 62 Miss. 86. See *Welles v. Thornton*, 45 Barb. 390.

³ *Powell v. Robinson*, 76 Ala. 423.

⁴ 34 La. Ann. 1133.

⁵ *Davies, ex parte*, 19 Ch. D. 86, distinguishing *Biddle v. Bond*, *supra*.

⁶ *Hodges v. Hurd*, 47 Ill. 363; *Gerber v. Monies*, 56 Barb. 652; *Erwin v. Arthur*, 61 Mo. 386.

⁷ *Blackburn, J.*, in *Biddle v. Bond*, 6 B. & S. 225.

those charges and his own are paid, or tendered him, to have a better title than his bailor.¹ Not even a special contract, whereby the hired bailee was only to deliver the thing on the bailor's written order, can be set up to justify the bailee's refusal to deliver over to the new owner, who fails to present such an order, and yet can otherwise prove his title.² Yet it would not be refusal to ask time for making prudent inquiries; and where a warehouseman has given a receipt promising delivery to the bailor or order, he may fairly require a party, who claims to be the new owner, to produce the receipt, or else furnish a sufficient bond of indemnity.³

§ 120. **Remedy against Bailee who is Remiss in Delivering.** — For a warehouseman's failure, upon demand, to redeliver, according to contract, goods stored with him, trover will lie, or an action of damages as for breach of the contract.⁴ Wherever a hired bailee, who fails to return the chattel, has agreed to pay for it, assumpsit is maintainable just as though there were a sale.⁵ And, if a bailee exchange his bailor's goods for other property, the bailor, by electing to ratify the trade, gains title in such other property.⁶ In general, the bailor for hired services should make a demand, before he can treat his bailee as in default, and sue for conversion or bring replevin; but plain misappropriation, or the utter destruction of the thing, dispenses with such demand.⁷ Nor,

¹ *Batut v. Hartley*, L. R. 7 Q. B. 594. See *Campton v. Shaw*, 3 Thomp. & C. 761.

² *Willner v. Morrel*, 40 N. Y. Super. 222.

³ *Patten v. Baggs*, 43 Ga. 167. See 2 Schoul. Pers. Prop. § 16; *Rogers v. Weir*, 34 N. Y. 463.

⁴ *Leonard v. Duntton*, 51 Ill. 482; *Bates v. Stansell*, 19 Mich. 91. As to the rule of damages, cf. *Stephenson v. Price*, 30 Tex. 715.

⁵ *Parker v. Tiffany*, 52 Ill. 286; 2 Schoul. Pers. Prop. §§ 511-528.

⁶ *Williams v. Porter*, 41 Wis. 422.

⁷ *Phelps v. Bostwick*, 22 Barb. 314; *Cochran v. Moore*, 1 Ala. 423; *Warner v. Dunnavan*, 23 Ill. 380; *Spencer v. Morgan*, 5 Ind. 146; *Halyard v. Dechelman*, 29 Mo. 459; *Roberts v. Yarboro*, 41 Tex. 449; 10 L. R. Ir. 224. See *Dunlap v. Hunting*, 2 Den. 643.

as will presently appear, has a bailor of the present class the right to demand his chattel back, regardless of his bailee's right to compensation, but should tender what is due.¹

§ 121. **Successive Bailment Duties considered.** — Warehouse men and wharfingers are, in modern business, closely associated with carriers; and successive parties, or even the same parties, may pursue towards the same thing bailment duties in succession. In setting the bound-posts of liability, where several parties perform, each in turn, customary modes and the circumstances of the particular transaction should be considered. Thus, if a warehouseman receives a load of grain from a railway, which he is to discharge into a vessel, his liability might commence with applying his crane to draw in the grain,² and cease, if the vessel controls a discharging-pipe, with the discharge of the grain into the pipe.³ And wherever the new bailee has taken full control, it is no defence that injury to the thing resulted, in part, from the prior bailee's carelessness.⁴ But where the prior bailee uses his own or some third person's machine, and still has control of the goods, he, and not the next bailee, is answerable for their safety.⁵

§ 122. **Right of Lien to secure Recompense.** — But the duty of making compensation must usually precede that of delivery back or over; that is to say, it is the bailor, rather than the bailee, who should here take the initiative; since the party hired is commonly treated as one entitled, on suitable per-

¹ *Brown v. Dempsey*, 95 Penn. St. 243.

² *Thomas v. Day*, 4 Esp. 262; *Randleson v. Murray*, 8 Ad. & E. 109; *Story Bailm.* § 445; *Jeffersonville R. v. White*, 6 Bush, 252; *Merritt v. Old Colony R.*, 11 Allen, 81.

³ *The Winslow*, 4 Biss. (U. S.) 13.

⁴ *Ib.* Where the bailee sends his servant, who takes the thing, and then injures it while getting it out of the warehouse or upon his cart, the bailee who has delivered is not responsible. *Reamer v. Davis*, 85 Ind. 201.

⁵ *De Mott v. Laraway*, 14 Wend. 225.

formance, to require his recompense before surrendering possession. Perhaps, however, delivery and compensation should be called concomitant acts, so far as one party seeks to put the other in the wrong by active litigation. For his better security in obtaining such recompense, the law gives to the hired bailee a lien upon the chattel, to the extent of whatever may be due for his particular service;¹ a right which usage and the written law have so constantly extended, that scarcely a transaction is left, referable to the present head, where the bailee is denied this advantage, unless it be in the case of an agistor or cattle-keeper.² Nor is even this instance wholly exceptional: for mutual agreement may create the lien;³ and the legislatures of most of the United States, where attention has been directed to the subject, have taken express pains to rectify the omission.⁴ One, at all events, who trains a horse for racing, has a lien at common law: not, however, as agistor, but as one hired for the skill he employs in enhancing the value of the chattel.⁵ Nor is the lien a privilege for regular occupations of hired bailment only, but it is inferable

¹ See, as to Lien. 1 Schoul. Pers. Prop. §§ 375-393; Jones (L. F.) Lien: 2 Kent Com. 634.

² A stable-keeper has at the common law no such lien. *Jackson v. Cummins*, 5 M. & W. 350; *Parsons v. Gingell*, 4 C. B. 545; *Smith v. Dearlove*, 6 C. B. 132; *Hickman v. Thomas*, 16 Ala. 666; *McDonald v. Bennett*, 45 Iowa, 456; 78 N. C. 96. Nor an agistor in general. *Grinnell v. Cook*, 3 Hill. 485; *Goodrich v. Willard*, 7 Gray, 183; *Miller v. Marston*, 35 Me. 153. But the law of Scotland gives such lien. 2 Bell Com. 110. And the position thus taken by the common law does it little credit. But see, as to lien enforcement, *post*.

³ *Goodrich v. Willard*, and *Miller v. Marston*, *supra*; *Whitlock v. Heard*, 13 Ala. 776; *McCoy v. Hock*, 37 Iowa, 436; *Smith v. Marden*, 60 N. H. 509.

⁴ *Allen v. Ham*, 63 Me. 532; *Young v. Kimball*, 23 Penn. St. 193; *Caminell v. Schley*, 41 Ga. 112; *Colquitt v. Kirkman*, 47 Ga. 555; 76 Me. 413; 21 Kan. 217; *Vinal v. Spofford*, 139 Mass. 126. Other liens are conferred by statute; as in log-driving. 32 Minn. 123.

⁵ *Bevan v. Waters*, 3 C. & P. 520; *Forth v. Simpson*, 13 Q. B. 680; *Harris v. Woodruff*, 124 Mass. 205.

so commonly from the relation of hired service about a thing, that the right to demand compensation is, as a rule, understood to carry with it the right of compelling compensation by a particular lien.¹ The finder may, on such terms, have this privilege.² And compensation for services and expenses about a vessel rescued from disaster is protected by a lien on the vessel, which the commercial codes of all civilized countries have, for centuries, faithfully upheld.³

The present lien, which is not general, but particular, is understood to secure only one's service and expense bestowed upon the identical thing bailed for hire; and not such balance as may be due on the bailee's general account with his bailor; for though, by special agreement or a well-sanctioned usage, a lien might be thus extended, the favor of the law shines only upon particular liens.⁴ Nor, in strictness, should the

¹ 2 Kent Com. 536, 627, 635; Story Bailm. § 440.

Hired bailees for bestowing work upon a thing have a lien within the rule of the text. *Morgan v. Congdon*, 4 Comst. 551; *M'Intyre v. Carver*, 2 W. & S. 392; *Wilson v. Martin*, 40 N. H. 88. And see *Farrington v. Meek*, 30 Mo. 578; *Mathias v. Sellers*, 86 Penn. St. 486.

Hired custodians, such as warehousemen, have also such lien. *Low v. Martin*, 18 Ill. 286; Story Bailm. § 453; *Bass v. Upton*, 1 Minn. 408; *Steinman v. Wilkins*, 7 W. & S. 466. So have wharfingers. *Holderness v. Collinson*, 7 B. & C. 212; *Leuckhart v. Cooper*, 3 Bing. N. C. 99; *Brookman v. Hamill*, 43 N. Y. 554; *Lewis, ex parte*, 2 Gall. 483. Statutes may affect this wharfage lien. See *Dresser v. Bosanquet*, 4 B. & S. 460.

On the principle that, where both parties are in the wrong, the possessor shall be the better off, it is held that one may have a lien for expense and skill bestowed in training an animal to run horse-races illegally for bets. *Harris v. Woodruff*, 124 Mass. 205. See *Hamilton v. Kennedy*, 59 Tenn. 476.

² *Wentworth v. Day*, 3 Met. 352; *Wilson v. Guyton*, 8 Gill, 213; *Cummings v. Gann*, 52 Penn. St. 484.

³ 1 Schoul. Pers. Prop. §§ 391, 392; *Abbott Shipping*, 5th Am. ed. 143; Story Bailm. § 622.

In *Leavy v. Kinsella*, 39 Conn. 50, a bailee by compulsion, as a seller of swine, whose purchaser wrongfully sends them back, is held entitled to his lien for keeping them pending litigation over the sale.

⁴ 2 Kent Com. 634; 1 Schoul. Pers. Prop. § 378; *Miller v. Marston*, 35 Me. 153, 155; 20 Fed. Rep. 894.

lien avail to one whom the bailee employed under him, and who knew that such bailee was not the owner, for here the work is done on the bailee's credit.¹ But, in certain occupations, pursued successively towards a thing, — as, for instance, a warehouseman, with whom freight is stored by a common carrier, — a bailee is justified in paying his predecessor's charges, and then holding the property until wholly reimbursed.² Government duties have to be paid on goods in our bonded warehouses, before they can be removed,³ except in great emergencies.⁴ And, we may add, a hired bailee's lien extends to all goods delivered him under one contract, and need not be confined to that part on which his labor was specially bestowed.⁵

§ 123. **How Lien is lost or secured.** — But this lien right does not override the will of the party for whose benefit our law asserts it. There can be no lien where the terms of the bailment undertaking or the status of the property expressly forbid the supposition that it was intended; as, for instance, where the bailee plainly agreed to give his bailor credit;⁶ but the silence respecting lien of a written contract can have no such effect.⁷ Founded, too, in continuous possession, the lien lasts only while the hired bailee chooses to maintain his hold; and voluntary, but not involuntary, relinquishment of

¹ *Hollingsworth v. Dow*, 19 Pick. 228; *Small v. Robinson*, 69 Me. 425; *Gilson v. Gwinn*, 107 Mass. 126.

² *Compton v. Shaw*, 3 Thomp. & C. 761. See *Common Carriers*, *post*, Part VI. It is said in *Bass v. Upton*, 1 Minn. 408, that a warehouseman's lien for storage and that for his advances on freight depend upon different principles of law.

³ *Clifford, in re*, 2 Sawyer (U. S.), 428; *Board of Trade v. Buckingham*, 65 Ill. 72.

⁴ See *Macklin v. Frazier*, 9 Bush, 3.

⁵ *Morgan v. Congdon*, 4 Comst. 551.

⁶ *Dunham v. Pettee*, 1 Daly, 112; *Tucker v. Taylor*, 53 Ind. 93; *Robinson v. Larrabee*, 63 Me. 116; *Hale v. Barrett*, 26 Ill. 195.

⁷ *Hazard v. Manning*, 15 N. Y. Supr. 613; *Mathias v. Sellers*, 86 Penn. St. 486.

possession on his part is tantamount to a waiver or abandonment of the lien.¹ A wrongful sale or pledge of the thing has the same effect, whether it be to punish the bailee, or because such act evinces, on his part, the intention of waiving the lien.² One may, without parting custody, so change his status towards the chattel as to lose his bailment lien.³ But mutual intent is not to be lost sight of; and one redelivering goods by portions may often enforce his whole lien upon what remains.⁴ Once divesting himself of his lien, the bailee cannot resume it at will, even though he takes the custody again; though a new lien may always be created by mutual assent.⁵ Finally, one may, by words and behavior, be estopped from asserting a claim of lien as against third parties, whose action he thereby influenced to their prejudice;⁶ and a mere omission on his part to assert his claim at the fitting time might have this effect.⁷

§ 124. **Right to sue for Recompense, apart from Lien.** — But, whether with or without his right of lien, the hired bailee may treat the bailor as personally liable for the amount of his just recompense;⁸ since a debt is enforceable apart from the

¹ *Tucker v. Taylor*, and *Robinson v. Larrabee*, *supra*; *Nevan v. Roup*, 8 Iowa, 207; *Estey v. Cooke*, 12 Nev. 276; 12 Neb. 66. Thus, in the case of an agistor's lien under statute, the lien is lost if the owner is allowed to take the horse out and a *bona fide* third party purchases without notice of the lien. *Vinal v. Spofford*, 139 Mass. 126.

² *Rodgers v. Grothe*, 58 Penn. St. 414; *Davis v. Bigler*, 62 Penn. St. 242. Local statutes sometimes dispense with the continuous possession. *Ib.* The bailee's use of the bailed animal for exercise does not displace the lien. *Munson v. Porter*, 63 Iowa, 453.

³ See 1 Schönl. Pers. Prop. § 386; *Pearson v. Dawson*, 1 E. B. & E. 448.

⁴ *Blake v. Nicholson*, 3 M. & S. 167; *Schmidt v. Webb*, 9 Wend. 268; *Parks v. Hall*, 2 Pick. 213.

⁵ *Robinson v. Larrabee*, 63 Me. 116; *Hale v. Barrett*, 26 Ill. 195.

⁶ *Blackman v. Pierce*, 23 Cal. 508.

⁷ *Weeks v. Goode*, 6 C. B. n. s. 367; *Rogers v. Weir*, 34 N. Y. 463; *Leigh v. Mobile R.*, 58 Ala. 165.

⁸ *Garrard v. Moody*, 48 Ga. 96; *Tucker v. Taylor*, 53 Ind. 93; *Cole v. Tyng*, 24 Ill. 99.

security. In case, however, his bailor has transferred title to the thing during bailment accomplishment, and he himself has attorned over to the new owner, our bailee may, without his security *in rem*, be put to the disadvantage of splitting up his demand; since a new owner cannot, without his own assent, be made liable, on a mere sale, for the seller's personal indebtedness.¹ A bailee, such as a warehouseman, who holds possession of goods, which he has received from two or more distinct owners, cannot, of course, compel one owner's goods to respond for the compensation due him on account of another.²

§ 125. **Bailee how put in Default; Demand, Tender, etc.**—The continuous possession of the hired bailee by right of his lien will, in general, be deemed rightful until his bailor has, besides demanding the chattel, paid or tendered what was lawfully due for the bailment service, and thereby put such bailee in default.³ This keeps the requisite standard of diligence as before, in the custody after performing the main service; though, once in clear default, our bailee becomes strictly liable, even for casual losses happening after he should have surrendered possession.⁴ Under many circumstances of bailment the hired bailee ought to give his bailor notice when his service is performed; but his failure to do so can rarely, of itself, put him in such default as to render his possession tortious. Demand and refusal make out a *prima facie* case of negligence against a bailee who renders no good excuse for not delivering; subject, however, to the rules of proof already considered.⁵

When, however, the bailor or other party lawfully entitled to the thing makes rightful and seasonable demand without tendering what is due, our bailee, if he has a claim *in rem* for

¹ *Lehman v. Skelton*, 46 Ala. 310.

² *Hale v. Barrett*, 26 Ill. 195.

³ *Russell v. Koehler*, 66 Ill. 459.

⁴ *Ib.*

⁵ *Claffin v. Meyer*, 75 N. Y. 260; 62 Cal. 164; *supra*. § 23.

unsettled recompense, ought promptly to assert it; and so, too, if insufficient recompense be tendered him; that his reasons may be understood.¹ If he refuse to surrender possession, unless paid for what the lien does not lawfully cover, he is liable as for conversion;² though by a subsequent acceptance of the thing the bailor may waive the right to sue.³

§ 126. **Means of enforcing Lien.** — The common-law means of enforcing a lien are somewhat imperfect; for one might hold, and nothing more.⁴ But the contract of the parties, as well as legislation, will sometimes confer the power of sale on default; as where an agistor takes cattle to keep on the understanding that he may sell as many of them as may suffice to remunerate him.⁵ And, indeed, it would be so burdensome for one to keep animals on the owner's default, without a right either to sell or appropriate them, that possibly the law, on this ground, refused to assume that a lien was intended for agistment service.⁶ A power to sell, being in derogation of common law, must be exercised in strict conformity with the contract or statute permission, not greedily, nor reckless of the bailor's interests, nor so that the bailee shall gain a surreptitious advantage; and the surplus of a fair sale (which is usually at auction) must be turned over, less costs and the bailee's due recompense.⁷ Our local legislation enlarges, in many instances, the bailee's lien remedies;⁸ independently of which, and of contract, one's lien right appears to be, for the

¹ *Weeks v. Goode*, 6 C. B. N. S. 367; *Rogers v. Weir*, 34 N. Y. 463; *Leigh v. Mobile R.*, 58 Ala. 165.

² *Roberts v. Yarboro*, 41 Tex. 449. But cf. *Dresser v. Bosanquet*, 4 B. & S. 460.

³ *Carnes v. Nichols*, 10 Gray, 369.

⁴ 2 Kent Com. 642; 1 Schoul. Pers. Prop. § 387.

⁵ *Whitlock v. Heard*, 13 Ala. 776; *Stephenson v. Price*, 30 Tex. 715.

⁶ *Supra*, § 122.

⁷ See 2 Schoul. Pers. Prop. §§ 627-646, as to sales at auction.

⁸ 2 Kent Com. 642; 1 Schoul. Pers. Prop. § 387.

most part, a mere right of detainer, and not an attachable interest.¹

§ 127. **Priority among Liens, etc.** — Priority among liens must sometimes be adjudicated; and especially where goods have not intrinsic value enough to recompense all lien claimants in full. The hired bailee's lien under *bona fide* possession, without notice of prior claims, being the closest, and for the most immediate benefit of the thing, should rank above those by way of mortgage, attachment, execution, and the like;² unless, indeed, the bailment acceptance was upon some different understanding,³ or the bailee, by some such act as parting possession, has afforded to another party a superior equity.⁴

§ 128. **General Right of Recompense.** — The right to demand compensation for valuable services rendered is so highly favored that the simple employment of a bailee about his usual business will sufficiently import an agreement on the bailor's part to pay what the service was reasonably worth.⁵ But the private arrangement of the parties themselves, if not fraudulent, may bind the bailor to remunerate at a standard far above or far below what the service ought in justice to command.⁶

¹ Lovett v. Brown, 40 N. H. 88. But as to assignability, see Nash v. Mosher, 19 Wend. 431.

² Powers v. Sixty Tons of Marble, 21 La. Ann. 402; 21 Kans. 217; Dobbins v. Clark, 59 Ga. 709.

³ See Lewis, *ex parte*, 2 Gall. (U. S.) 483. As to the vendor's lien for his purchase-money, with reference to a purchaser's bailee, see Blackman v. Pierce, 23 Cal. 508, and, in general, 2 Schoul. Pers. Prop. Part VI., c. 13. The Liens of Innkeepers and Common Carriers are specially considered, *post*.

⁴ Marseilles Co. v. Morgan, 12 Neb. 66.

⁵ Graves v. Smith, 14 Wis. 5, 8.

⁶ Southern Steamship Co. v. Sparks, 22 Tex. 657. See Hazeltine v. Weld, 73 N. Y. 156.

CHAPTER III.

HIRED USE OF A CHATTEL.

§ 129. **Classification of the Present Chapter.** — Our former classification may still be conveniently used for this chapter: I. Matters preliminary, including delivery in bailment. II. Accomplishment of the bailment purpose. III. Termination of the bailment.

§ 130. **Matters Preliminary; Nature of Hired Use; Gratuitous Loan compared.** — I. Matters preliminary, including delivery in bailment. In the bailment for hired use, the bailor, technically styled the “letter,” shifts over into the party entitled to recompense, while the hirer, in return, becomes bailee. This bailment, like its correlative already examined, the gratuitous loan, contemplates the temporary beneficial use of a chattel which the bailee must eventually return; and the only essential point of difference is that in the former case the bailee was to have the use for nothing, while here he is bound to make recompense.¹

Compensation puts parties on so much more even a footing, and harmonizes so much better with the average expectation of mankind, that bailments for use are much more readily classed under the present than the former head; and especially is this true where the use designed is of much value, or the bailor parts possession in the line of ordinary business: notwithstanding which the intelligent understanding of particular parties, intelligently shown, concludes the issue.² In general, a claim for the use of a thing for a certain time, is

¹ Cf. *supra*, Part III.

² See *Carpenter v. Branch*, 13 Vt. 161; *Cullen v. Lord*, 39 Iowa, 302; *Francis v. Shrader*, 67 Ill. 272.

supported by proof of one's possession for that time, with the right to use it at pleasure.¹

Even the bailment of a horse for use in distinct consideration of its feed and keep, may make the bailee, in effect, a hirer, not a borrower;² though not, we apprehend, a borrower's incidental obligation to feed and keep the animal, where no such expectation of a reciprocal benefit appears to have entered into the undertaking.³

Our reports furnish few cases of consequence under this head, save in the instance of hiring a horse or carriage. Yet the transaction is familiar enough; as in the hire of a boat, of a piano, of a sewing-machine, of furniture,⁴ of rolling stock for transportation. For the hire of ships and vessels, by charter-party and the like, maritime law has peculiar rules.⁵

§ 131. **Right to Use, how understood and limited.** — The contract for hired use once *bona fide* closed by competent parties, the manner and period of rightful use are ascertainable from their agreement as rationally interpreted. Some particular use we might thus find prescribed; such as the use of one's horse to go from Washington to Alexandria; or of one's furniture, along with his rented house; or, once more, of one's horse, his furniture, or other chattels, for any reasonable and consistent use that the bailee may think desirable.

¹ Reilly v. Rand, 123 Mass. 215.

² Chamberlin v. Cobb, 32 Iowa, 161. Where the use of a horse or other chattel, animate or inanimate, is given in what is called "a sale on trial," the bailment during the period of trial brings the case under our present head.

³ Cf. Bennett v. O'Brien, 37 Ill. 250; *supra*, §§ 78, 90.

⁴ In England the custom of hiring furniture (not to add coaches and barges), is notorious; and seldom does a hotel-keeper own the furniture in his possession. 18 Ch. D. 30. It is becoming common in this country to let houses or flats furnished; and here, as in other similar instances, where real and personal property are "leased" together, one must be careful to use appropriate words for each kind, and not rely upon the technical words of real-estate covenants to describe the hired use of personalty.

⁵ 1 Schoul. Pers. Prop., §§ 301-334.

So, the period set may be for some definite time; or, in general, long enough for the bailee to seasonably accomplish a purpose; or, perhaps, so long as both parties may mutually desire. The true intent of the bailment is, throughout, our guide on such points.¹ But whatever the kind of hired use, or its period, it must, at our law, contemplate the final return of the thing, and not its consumption in the use; though, granting this, the bailment may be of chattels in themselves consumable or non-consumable when put to their most natural use.² And of course the hire relates to a chattel, to personal property.

§ 132. **Contract for Bailment and Bailment compared.**— Upon the mere bailment contract of hire, which is, unlike that of loan, upon sufficient mutual consideration, each party becomes obliged to a performance in the delivery and acceptance, whose breach gives the injured one the right of legal redress;³ since neither non-feasance nor misfeasance is permitted. But an actual or constructive delivery and acceptance are needful, or, at least a receipt of the thing in bailment in order that they may stand on the full footing of bailor and bailee, letter and hirer. The reciprocal duties and rights of that completed relation we now proceed to consider; not without reiterating the general statement that agents may be concerned in such

¹ Under the Roman law, the contract of letting and hiring, as to compensation and other incidents, is governed by rules similar to those of purchase and sale. *Poste* Gaius, III., §§ 142, 143; Colquhoun *Rom. Civ. Law*, § 1674. But under this system both real and personal property were treated under the same head of *locatio-conductio*. *Ib.*

² *Supra*, § 69. And see *Story Bailm.* §§ 370 *a*, 415 *a*, where the *mutuum*, following Pothier's divisions, is denominated an "irregular contract of hire."

³ *Supra*, § 71. By the French law, the letter's offer to deliver the thing in an injured or altered condition from that agreed upon entitles the hirer to refuse to receive it, and insist upon rescinding the contract. *Pothier Contrat de Louage*, n. 74. Probably the same holds substantially at our law, though decisive authorities are wanting. See *Story Bailm.* § 384 *a*.

undertakings, on behalf of principals, and that the letter or bailor himself may be a qualified, not absolute, proprietor of that which is put out in bailment.

§ 133. **Accomplishment of Bailment Purpose; Hirer's Duties.**

— II. Accomplishment of the bailment purpose. The hirer's duties will receive our first attention. These are, chiefly, to use the thing with due care and diligence, and for no other purpose than the letter may have sanctioned expressly, or by implication; to deliver it back or over at the appointed time; and to yield the intended recompense for such use. Nor, as concerns third persons, should the thing be injuriously used.

§ 134. **Measure of Care and Diligence; "Ordinary."** — As to the measure of care and diligence required, the hirer for use is, like all other mutual-benefit bailees, bound to exercise ordinary or average care and diligence;¹ and for nothing less than ordinary negligence, or the failure to exercise such care and diligence as persons of average prudence bestow towards such property or upon their own property under like circumstances, is he, while confining himself to the terms of the bailment, legally responsible.² This, in each case, becomes, as in other bailments, a question of fact upon all the evidence.

§ 135. **The same Subject; Instances where the Hirer is excused.** — Inevitable accident or superior force excuses this bailee sufficiently, then, from returning the thing as it came to him;³ and so with loss by accidental fire, or the natural deterioration of the thing, its wear and tear or spoliation, from causes against whose operation he has been ordinarily careful;⁴ or, in the case of a hired animal, its sickness or death,

¹ *Supra*, § 15.

² 2 Kent Com. 586; Jones Bailm. 66-69; *Handford v. Palmer*, 2 B. & B. 359; *Millon v. Salisbury*, 13 Johns. 211; Story Bailm. § 398; *Collins v. Bennett*, 46 N. Y. 490; *Chamberlin v. Cobb*, 32 Iowa, 61; cases *infra*.

³ Story Bailm. §§ 408-412; *Watkins v. Roberts*, 28 Ind. 167; *Hyland v. Paul*, 33 Barb. 241; *Field v. Brackett*, 56 Me. 121; *McEvers v. Steamboat Sangamon*, 22 Mo. 187.

⁴ *Ib.*

under like circumstances.¹ But where the cause of the sickness or death of the creature, or, in general, the cause of the injury, waste, or destruction of the thing bailed, is traced to the hiring bailee's abuse or neglect of duty, or, as it is sometimes said, where his ordinary negligence contributed thereto, or was the proximate cause of the injury or loss, he must be held responsible.² Similar considerations apply to the loss of hired chattels by robbery, theft, the escape of animals, and the like; the issue being, as between bailor and bailee, whether, upon the facts presented, the latter party has, or has not, exercised ordinary care in the premises.³

§ 136. **Law of other Countries compared.**—In the degree of alacrity and care thus required of a hirer for use, our law is like that of France, as expounded by Pothier, and of Louisiana and Scotland;⁴ nor, perhaps, did the Romans inculcate a different theory of responsibility, though, on that point, the most critical of commentators are not in accord.⁵

¹ *Buis v. Cook*, 60 Mo. 391; *Harrington v. Snyder*, 3 Barb. 380; *Carrier v. Dorrance*, 19 S. C. 30; *Francis v. Shrader*, 67 Ill. 272; *Eastman v. Sanborn*, 3 Allen, 594.

² *Buis v. Cook*, 60 Mo. 391; *Eastman v. Sanborn*, 3 Allen, 594; *Edwards v. Carr*, 13 Gray, 234; *Wentworth v. McDuffie*, 48 N. H. 402.

³ *Story Bailm.* §§ 408, 412; *Beverly v. Brooke*, 2 Wheat. 100. See *Jones v. Morgan*, 90 N. Y. 4, where the rule is applied in the case of property lost, some of which was recovered by the aid of detectives.

⁴ *Pothier Contrat de Louage*, n. 190, 192; *Nicholls v. Roland*, 11 Mart. 190; 1 Bell Com. 453, 455, 5th ed.

⁵ See *Story Bailm.* § 393, where the authorities are collated; *Jones Bailm.* 87, 88. The controversy, which is a nice one, turns chiefly upon the exact force intended by *diligentissimus* in the Institutes of Justinian. Inst. 3, 25, § 5. Sir William Jones, who considers the word used strongly but not literally, did much to turn English decisions on this point into a rational channel, whence Bracton, whom Lord Holt followed, would have diverted them. *Coggs v. Bernard*, 2 Ld. Raym. 909, 916; *Jones Bailm.* 67, 87, 88.

The famous *Gainus* is by some considered responsible for the appearance of the word *diligentissimus* in this connection in the Institutes. See

§ 137. **Rule illustrated; Instance of Hired Horse.** — Let us take, for example, a case by far the most familiar under this head to English and American courts, namely, that of a horse hired for use. Now, unless the bailee took the animal for too short a time, or under a special arrangement whereby the bailor was to look after his own property, he ought to provide the creature regularly with proper food and drink, afford due shelter and repose, and, in general, take reasonable heed that the animal, while resting, is so fastened up that it may not readily run away or be stolen. While putting the horse to active use he should not harness carelessly, overload, overdrive, be heedless of what he perceives to be the creature's frailties, nor fail to supply, prudently, wants essential to its health and good condition. If disease or bruise be discovered during the bailee's term, he should be discreet in its treatment, and in extremity call in some farrier or expert; or else, informing his bailor promptly, throw the responsibility, as he may generally do, upon the owner. During his whole term of use the bailee ought to act honorably, humanely, and with such reasonable regard for preserving the animal's value unimpaired as from prudent men might be expected. But circumstances, such as the length of the term of use, and the opportunity of summoning the bailor, may be material.¹ So

2 Kent Com. 588 and *n.*, where a special explanation of the use of this superlative is suggested.

But see, on this subject, the explanation, afforded by some of our latest critical scholars of the Roman law, to which we have already adverted. Poste Gains, 394-397; *supra*, § 16 and *n.*

¹ See Story Bailm. §§ 399, 405; Jones Bailm. 88, 89. The hirer of a horse has in numerous instances been deemed wanting in ordinary diligence. As, where the loss is caused by his improper feeding or omitting to feed. *Handford v. Palmer*, 2 B. & B. 359; *s. c.* 5 Moore, 74; *Eastman v. Sanborn*, 3 Allen, 594. And see *Cross v. Brown*, 41 N. H. 283. Or by overdriving and overheating. *Banfield v. Whipple*, 10 Allen, 27; *Edwards v. Carr*, 13 Gray, 234; *Wentworth v. McDuffie*, 48 N. H. 302; *Rowland v. Jones*, 73 N. C. 52; *Ray v. Tubbs*, 50 Vt. 688; *Buis v. Cook*, 60 Mo. 391. Or by overloading. See *M'Neill v. Brooks*, 1 Yerg. 73; *Harrington v. Snyder*, 3 Barb. 380. Or by securing the horse improperly.

long as the hirer thus fairly behaves, on the whole, and faithfully observes the terms of his engagement, it is the bailor and not he who must bear all damage which may befall the animal in the course of its use.¹

§ 138. **Elements affecting such Issues; Nature of Thing; Character of Hirer, etc.**—In adjusting the standard of ordinary diligence for hired use, much, as in other bailments, must depend upon the nature of the chattel, its incidental exposure to loss or destruction, and its actual condition at the time of delivery.² Nor should the hirer's personal reputation be wholly ignored, nor his skill and opportunity for good performance, as brought to the bailor's knowledge. Any person whom the letter plainly perceives to be physically or mentally incapable, as a young child, an imbecile, a paralytic, or one who has lost an arm, cannot be presumed the hirer of a horse or a boat to manage in person with average skill. Yet one may be a hirer as the party answerable rather than the active user of the thing; and it is held that one who makes a business of letting horses on hire may well accommodate his customers so far as to risk injury to the thing he lets out, trusting to the hirer's pecuniary responsibility for fulfilling his contract.³ And naturally the bailee's skill and personal qualifications are less likely to be considered here than in one's hire of services upon his chattel.

§ 139. **Where the Hirer transcends the Bailment.**—Hitherto we assume that the hirer keeps within the terms of his bailment, as every bailee ought to do. But in a bailment for

See *Jackson v. Robinson*, 18 B. Mon. 1. Or by continuing his journey carelessly, or administering quack remedies, after he finds that the animal is sick. *Thompson v. Harlow*, 31 Ga. 348.

¹ *Millon v. Salisbury*, 13 Johns. 211; *Harrington v. Snyder*, 3 Barb. 380; *Buis v. Cook*, 60 Mo. 391; *Francis v. Shrader*, 67 Ill. 272; *Carrier v. Dorrance*, 19 S. C. 30.

² *Supra*, §§ 74, 102.

³ *Moers v. Larry*, 15 Gray, 451.

beneficial use, and more especially where the minds of the parties have met upon a *quid pro quo*, the bailee is strongly tempted to transcend the recognized limits of his trust. If I hire pictures for use in my dwelling, I have no right to put them for profit upon public exhibition; if I hire a thing for one month, I must not, unless the letter permits an extension, keep it for two months; if I engage a horse for a journey north, I am not to take it southwards; if I hire cattle to do one kind of work, I must not put them to a different kind. In brief, putting the chattel to a use more extensive or materially different from that mutually agreed upon is deemed a breach of faith, on the hirer's part, so gross as, in most instances, to make him very strictly answerable, and sometimes absolutely so, for all loss and injury thereupon ensuing.¹

Thus, it is held that, if one hires a horse for a specified journey, and drives it beyond the place designated or on a different course, he so takes upon himself the consequences that inevitable accident does not excuse him,² nor the horse's fault in running away;³ for here the misuse or wrongful deviation of the hirer is treated as the occasion of the loss or damage. And a marked application of the rule is made in the case of a minor; who, for injuring a hired horse by carelessly driving to the place agreed upon, cannot be absolutely responsible, since he may plead infancy, if he choose, to the breach of contract;⁴ while he is suable if he injures the

¹ 2 Kent Com. 568; Story Bailm. §§ 396, 413; Pothier de Louage, n. 189, 190; *Wheelock v. Wheelwright*, 5 Mass. 104; *Lucas v. Trumbull*, 15 Gray, 306; cases, *infra*.

² *Buchanan v. Smith*, 17 N. Y. Supr. 474; *Fisher v. Kyle*, 27 Mich. 454; *Wentworth v. McDuffie*, 48 N. H. 402; *Lane v. Cameron*, 38 Wis. 603; *Ray v. Tubbs*, 50 Vt. 688. Overdriving, such as to cause an animal's death, might well result from driving to a place far beyond that agreed upon.

³ *Lucas v. Trumbull*, 15 Gray, 306.

⁴ *Jennings v. Rundall*, 8 T. R. 335.

animal by driving elsewhere, inasmuch as even infants must answer for their torts.¹ The same strict liability on the bailee's part is asserted of one who hires a horse for a fixed time, but continues to use it much longer;² or animals, set to hauling something more difficult than that for which they were engaged.³

For a gross and wilful or wanton misuse of the thing hired the hirer might, perhaps, be summarily dispossessed by the letter;⁴ though this should not be done with personal violence, nor, as it appears, done at all, if a definite term of hire be still running.⁵ But in all such cases the letter has liberal permission to bring his action of trover;⁶ not, we may say, on the ground that the hirer has, in the ancient sense of the word, converted the thing let to him, but because the bailee's gross, wilful, or wanton violation of his bailor's rights makes it reasonable to treat the bailment as virtually ended.⁷ Action on the case, founded in the hirer's tort, appears, to be sure, the more appropriate form of action for mere misuse during an unexpired term of hire.⁸ Yet for one's taking or detaining, so as to destroy the chattel, or with the intent of converting it to his own use or that of some third person, trover would lie at common law against

¹ *Homer v. Thwing*, 3 Pick. 492. Cf. *Whelden v. Chappel*, 8 R. I. 230. And see *Schoul. Dom. Rel.* §§ 410, 423.

² *Stewart v. Davis*, 31 Ark. 518. Returning the engaged horse and substituting another implies that the original engagement extends to the substituted animal; and not to take such opportunity to obtain the letter's permission to go elsewhere leaves the hirer without an excuse for doing so. *Ray v. Tubbs*, 50 Vt. 688.

³ *De Voin v. Michigan Lumber Co.* (Wis. 1885).

⁴ *Trotter v. McCall*, 26 Miss. 413.

⁵ *Lee v. Atkinson*, Yelv. 172.

⁶ *Loeschman v. Machin*, 2 Stark. 311; *Lucas v. Trumbull*, 15 Gray, 306; *Story Bailm.* § 396; *Wentworth v. McDuffie*, 48 N. H. 402.

⁷ See *Wentworth v. McDuffie*, *supra*, and cases cited. But see *Harvey v. Epes*, 12 Gratt. 153.

⁸ Yelv. 172, *n.*; *Setzar v. Butler*, 5 Ire. 212; *Littledale, J.*, in *Burnett v. Lynde*, 5 B. & C. 609; *Lane v. Cameron*, 38 Wis. 603.

the hired bailee;¹ or, for the chattel's destruction, trespass instead, at his bailor's election.² Destruction of the thing, then, furnishes additional justification of the suit as for conversion in some of the present cases; while others may rest upon the practical abolition, by statute, of all distinctions among actions grounded in tort.³

§ 140. **The same Subject.** — We should here observe, nevertheless, that in the modern cases which treat the bailee so harshly for departing from his permitted use, however broad may have been the expressions of the court, the evidence, in almost every instance, shows the hirer to have been negligent in fact, or even wilfully or wantonly misconducting himself; he was overdriving, perhaps, or breaking the Sunday laws, or destroying or ruining the property. Hence, the assertion of an absolute responsibility under circumstances of unpermitted use becomes, in reality, the convenient means of clinching a righteous verdict against a defendant who has otherwise hurt his case. On the other hand, it is not difficult to conceive that technical misuse might occur without an actual abuse of the terms of hire, and where it would be harsh to visit deviation with such disastrous penalties. A conclusion is reached in one case, after a searching review of the authorities, that in a bailment for hire upon a certain term, and not merely during pleasure, the hirer's use of the property differently in purpose or manner from what had been mutually intended, will not amount to a conversion justifying trover, unless the chattel's destruction was thereby occasioned, or, at least, unless the act was done with intent to convert.⁴ Intimations are thrown out in other quarters, that absolute liability for misuse is not incidental to hire for use equally with the

¹ *Fouldes v. Willoughby*, 8 M. & W. 540; *Harvey v. Epes*, 12 Gratt. 176.

² *Yelv.* 172, *n.*; *Setzar v. Butler*, 5 Ire. 212.

³ See *Lucas v. Trumbull*, 15 Gray, 306.

⁴ *Moncure, J.*, in *Harvey v. Epes*, 12 Gratt. 176. But cf. *Wentworth v. McDuffie*, 48 N. H. 402.

gratuitous loan for use, nor to hire for a fixed term like precarious hire;¹ and again, that, for driving elsewhere, one might have to respond more strictly than for driving longer than agreed upon.² Both Sir William Jones and Story suggest possible exceptions to the doctrine that one *in mora* must respond absolutely;³ which position they fortify, not by Pothier and the civilians alone,⁴ but the analogies of the common law.⁵

In truth, the leaven of common sense, which keeps our law in constant ferment, is here at work, recalling the injustice of visiting blameworthy and blameless deviation with the same penalties of absolute or insurance accountability. One hires a horse for a given journey, but unexpectedly encounters a friend, and turns off to visit him, using, all the while, a prudent care of the animal; or he finds obstructions in the road, and changes the point of destination to another which must have equally suited his bailor, or he misses his way. Such instances are matters of every-day occurrence. And how few who hire a carriage and drive carefully believe themselves tied down to a literal performance, irrespective of all emergencies which may possibly occur too far off for consulting the bailor. How few imagine that, for a little longer or a little different ride, they incur an extra risk, beyond that of paying, possibly, an extra hire.⁶

¹ Cullen *v.* Lord, 39 Iowa, 302. And see Yelv. 172.

² See Whelden *v.* Chappel, 8 R. I. 230.

³ Jones Bailm. 70, 71; Story Bailm. § 413 *c.*

⁴ *Ib.*; Pothier Prêt à Usage, n. 55-58.

⁵ The Paragon, 1 Ware, 322, 324; Story Bailm. § 413 *d.*; Collier *v.* Valentine, 11 Mo. 299; Hart *v.* Allen, 2 Watts, 114; Carriers, *post*, Part VI.

⁶ The views of the text receive later confirmation from Spooner *v.* Manchester, 133 Mass. 270; though here the argument of the court is founded rather in the law of torts than bailments. One who hired a horse to drive to a particular place, and in returning lost his way and took what he considered the best way home by a circuitous route, was held not liable in trover for conversion, where the horse's ankle was injured without any apparent want of ordinary care on the hirer's part.

§ 141. **The same Subject.** — For cases like these last, too common, save among the reported cases, to be called exceptional, two grounds of defence may be worth alleging, where the hired bailee is sued for some loss which he unfortunately encountered while still exercising ordinary diligence. (1) One, which Judge Story sets forth in a tentative way, not without support from the law of carriers, is that, for casualties arising while the hirer deviates from duty, he might not be responsible, provided the loss must manifestly have occurred, even if he had not so deviated.¹ The practical difficulty is, however, to establish that it must so have occurred; since it is admitted that the burden of establishing non-contribution to the injury is upon the party thus *in mora*.² (2) The other, and perhaps more serviceable, lies in a just and reasonable interpretation of the bailment undertaking itself, which, if pursued with ordinary prudence, under all the circumstances, ought not to be too literally construed against a bailee who may have found himself in some unforeseen emergency, and, while far from the bailor, obliged to act upon his own judgment. For one who hires may be presumed to have much latitude, as to time and methods of enjoyment; and local usage and the good sense of the contract should interpret favorably, where restrictive use was not clearly specified. If hiring be general, any prudent use of the thing is permissible;³ and even if it be

¹ Story Bailm. §§ 409, 413–413 *d.* And see *Davis v. Garrett*, 6 Bing. 716; *Jones Bailm.* 70, 71. In *Harvey v. Epes*, 12 Gratt. 153, Moncure, J., lays it down, that where a bailee for hire, engaging cattle for a considerable period to work in one place, takes them to work in another, and they afterwards die, their removal does not, *per se*, render him absolutely responsible as a wrong-doer; but that the question arises upon the death, whether it was occasioned by so removing and working them there, for if it was, he is liable for their value, either in case or trover.

² *Ib.* Even in *Lucas v. Trumbull*, 15 Gray, 306, where the language of the court appears distinctly to exclude such a defence, the decision seems to be unexceptionable on the facts presented.

³ See *Horne v. Meakin*, 115 Mass. 326; *McLaughlin v. Lomas*, 3 Strobb. 85; *Harrington v. Snyder*, 3 Barb. 380.

particular, terms not fairly meant for exclusion need not warp the hirer's discretion, if he is prepared to pay a reasonable compensation according to his use; and more especially so where an exigency happens which calls for the exercise of discretion on his part without consulting the bailor.

§ 142. **Hirer's Misappropriation of the Thing.** — The hirer's attempt to sell, pawn, or otherwise transfer full title in the thing hired, without permission, is a violation of duty so palpable as justifies the bailor in treating the bailment as ended, though it were for a fixed term, and pursuing the chattel at once as his own;¹ and this, too, would appear to render the bailee absolutely accountable in the premises. The letter may, in such event, sue in trover without making demand upon the hirer, and may recover possession, even though the thing be in a stranger's hands;² not, however, in disregard of the usual limitations which apply in favor of *bona fide* purchasers for value.³ Thus, in Great Britain, where coach, barge, and furniture dealers have been wont to let out goods on long terms to private parties,⁴ emblazoned with the hirer's coat-of-arms, the dealer has been allowed to follow his property into the hands of one who purchased it, in good faith, at an auction of the hirer's effects, imagining that honor and heraldry must needs go together.⁵

But with the hirer's assignment of his beneficial interest alone, the rule appears to be different; and such a transfer, if made with due reservation of the bailor's permanent ownership, ought not to be treated as a conversion, but rather upheld,

¹ Story Bailm. § 413; *Bryant v. Wardwell*, 2 Ex. 479; *Sargent v. Gile*, 8 N. H. 325; *Swift v. Moseley*, 10 Vt. 208; *Lovejoy v. Jones*, 10 Fost. 165; *Singer Man. Co. v. Clark*, 5 Ex. D. 37.

² *Ib.*; *Loeschman v. Machin*, 2 Stark. 311; *Fouldes v. Willoughby*, 8 M. & W. 510; *Cooper v. Willomatt*, 1 C. B. 672; *Johnson v. Willey*, 46 N. H. 75; *Dunham v. Lee*, 24 Vt. 432.

³ See 2 Schoul. Pers. Prop. §§ 20, 21; c. 4, *post*.

⁴ See *supra*, § 130, *n*.

⁵ *Marner v. Bankes*, 16 W. R. (C. P.) 62.

unless the use stipulated was to be strictly personal or precarious, and assignment without the owner's assent forbidden.¹ For while a merely gratuitous bailee enjoys but a personal privilege, incapable of being set over to third parties, the interest of a hirer for use may be pronounced valuable, like that created in the lessee's favor under some unrestricted lease of real estate.

§ 143. **Illegal Use ; Disregard of Sunday Laws, etc.** — Illegality and turpitude going to the foundation of a bailment contract for use puts the party who is out of possession, and seeks redress, necessarily at disadvantage. And any letter of a thing, who would avail himself of his hirer's fraud or unlawful conduct, must be free from blame. But, if his cause of action be a good one, apart from any misconduct which might incidentally appear in proof against him, the current opinion is, that the courts will sustain him. Such is the case where one was allowed a horse to make a journey in violation of the Sunday laws, and yet is sued, in fact, because of inflicting damage while departing from the terms of that bailment ; for here, it would be said, the letter's action is grounded, not on the Sabbath-breaking contract, but on a tortious, unpermitted use of the thing.² And of the laws prohibiting secular travel on the Lord's day, we may add, more generally, that they do not forbid the performance of works of charity or necessity ; so that one may lawfully hire a horse to go to church, or attend a funeral,³ or to perform a public duty, such as taking a prisoner to jail,⁴ or even, as some States construe the law, to make a family visit.⁵ If, however, the hirer, for some such lawful purpose, should turn aside from his contract, and

¹ *Bailey v. Cobb*, 34 N. H. 29; *Vincent v. Cornell*, 13 Pick. 294; *Nash v. Mosher*, 19 Wend. 431. And see *Fenn v. Bittleston*, 7 Ex. 152.

² See *Frost v. Plumb*, 40 Conn. 111; *supra*, § 92 ; *Hall v. Corcoran*, 107 Mass. 251; *Stewart v. Davis*, 31 Ark. 518.

³ *Horne v. Meakin*, 115 Mass. 326.

⁴ *Fisher v. Kyle*, 27 Mich. 454.

⁵ *Logan v. Mathews*, 6 Penn. St. 417.

proceed to put the horse to a secular and prohibited use, there is no doubt that the letter, his own hands being clean, would have the right to treat his bailee as a wrong-doer, and call him to strict account accordingly.¹

§ 144. **Remedies for Loss or Damage; Proof, etc.**—It has been said that, where a chattel hired for one purpose and misused for another is returned injured, without explanation, the inference is rational that the injury occurred during the period of misuse.² Something depends, however, upon the actual circumstances; nor is the general rule for burden of proof in bailments uniformly asserted.³ Where the chattel is returned injured, or not returned at all, and yet the circumstances are such as impute no culpable negligence to the hirer, he cannot be held liable.⁴

The letter may doubtless waive his right of action for damage sustained because of his hirer's default; but merely receiving back the injured chattel amounts, it is held, to no such waiver;⁵ nor even, supposing the thing destroyed, accepting hire-money up to the date of destruction,⁶ and giving a receipt as in full therefor.⁷ What is due care and diligence is usually for the court to rule; and whether the bailee has, upon all the proof, exercised such due care and diligence, for the jury to determine.⁸

§ 145. **Bailee's Responsibility for his Sub-Users, etc.**—What is the rule of bailment responsibility in hired use as concerns

¹ *Fisher v. Kyle*, 27 Mich. 454.

² *Buchanan v. Smith*, 17 N. Y. Supr. 474.

³ *Supra*, § 23, where this subject is fully discussed.

⁴ If, for instance, one of two or more horses hired together to make a journey is shown to have been taken sick on the road and died, while the others are returned in good condition, this showing does not sufficiently establish a liability on the hirer's part. *Carrier v. Dorrance*, 19 S. C. 30.

⁵ *Story Bailm.* § 414; *Lucas v. Trumbull*, 15 Gray, 306; *Austin v. Miller*, 74 N. C. 274.

⁶ *Harvey v. Epes*, 12 Gratt. 153.

⁷ *Bigbee v. Coombs*, 64 Mo. 529.

⁸ *Rowland v. Jones*, 73 N. C. 52.

the acts of a bailee's sub-users and those admitted to the property? As the hirer must answer, not only for loss and injury inflicted upon the thing by himself in person, but for loss and injury which invaders of his possession have immediately caused, while he failed honorably and with ordinary diligence to repel them or repair the mischief, so is he treated as the party ultimately responsible to his letter for the injurious acts of those whom he voluntarily admits, so to speak, into the use of the thing. And this responsibility applies not to technical servants or one's agents employed about the thing only, but to all such as the hirer may allow to participate in the benefit he enjoys; in general to domestics, members of his family, boarders, guests, and the like.¹ Why the bailee should respond to the bailor for the acts committed by such parties in the premises is because the hirer's undertaking is with the letter, who has no privity of contract with those parties, whatever the hirer's own remedies might be. Herein eminent writers have declared the common-law rule, which that of modern continental Europe is thought to resemble, vastly superior to the imperial doctrine of Justinian's age; for, as they affirm, the hirer is, in the present instance, bound to exercise a salutary diligence and caution in regard to those who are admitted into his house or kept in his service, whereas he was before responsible only when culpably negligent in admitting careless guests, or boarders, or servants into his house.²

But, in advance of a conclusive settlement of this matter in the courts, we may venture a doubt whether these writers have fully grasped the filament of this liability, and whether, in point of fact, the ancient theory differs far, in this respect, from the modern. Our common law of agency grows out of the Roman stock, and we apprehend that the universal prin-

¹ Story Bailm. §§ 400, 401; Jones Bailm. 89, 90; Pothier Contrat de Louage, n. 193, 428; cases, *infra*.

² *Ib.*; Ulpian, in Dig. 19, 2, 11.

ciples of agency are at the root of the present discussion; in other words, that the distinction avails, elsewhere noticed, which renders a master or principal liable for the acts of his servant or agent, when committed in the usual and permitted course of employment, but not, except it be as a contributor, for the servant's or agent's clearly unauthorized, unsanctioned, and tortious acts.¹ We here suppose that the hirer is not deviating wrongfully from the bailment, nor giving a use of the thing or access to others which the letter had expressly forbidden.²

§ 146. **The same Subject** — To illustrate the point more fully. If I hire a horse to be kept at my stable, or furniture to be kept in my house. it may well be said, with Story, that for the default and negligence of my children and domestics about the thing hired I am liable.³ But for a hired office safe, or store counter or furniture, my responsibility for the acts of such persons is likely to be asserted more cautiously. Yet for the negligence and default of my office or store clerks I shall here answer, because, as before, they became the parties admitted to such use; for there may be household agents for a household bailment, and store or office agents for a store or office bailment. But now, as to the household bailment, no doubt the hirer of furniture in a house would commonly be responsible to his letter for such damage as his family, his guests, his boarders, as well as his domestics, might occasion, while acting each within the scope of admission to its use; and, on the letter's behalf, this doctrine should be broadly applied.⁴ But if the guest or boarder, admitted, as is customary, only to special rooms, should break into some private chamber, forcing the lock, and there wan-

¹ *Foster v. Essex Bank*, 17 Mass. 479; *supra*, § 19. See Schoul. Dom. Rel. §§ 490, 491; Smith Mast. & Serv. 151, 152; Story Agency, §§ 308, 452.

² *Supra*, §§ 139-142.

³ Story Bailm. § 400.

⁴ *Ib*; Jones Bailm. 89; Pothier Contrat de Louage, n. 193.

tonly deface or abstract the furniture, would the hirer be equally answerable? Not, if the analogies of agency apply to the case; for *respondet superior* no longer applies, and the wrong-doer is simply a wanton trespasser or thief, with only better opportunities for perpetrating a crime than burglars commonly enjoy. And this holding true, the principal hirer, if honest, is responsible to his letter only supposing he failed to exercise ordinary diligence in the premises; as where he carelessly admitted an unsuitable person, or failed in guarding the property with discretion.¹ If again, I hire a pin set with rare gems, I may show it to some trusty friend; nor, indeed, would the most prudent man easily avoid giving his acquaintances a look at it; while passing the thing about in a crowd of strange vagabonds must be very imprudent. And yet, upon the access given in the former instance, a loss might, in fact, occur; and, if it did, I ought not to be so plainly chargeable, as in the last-mentioned instance. For, in general, the hirer for use is no insurer, but must simply use ordinary care and diligence. Once more, as the hirer of pictures for a public exhibition, I am doubtless responsible for damage caused by visitors who carelessly rub against them in the course of their permitted inspection; but, supposing a visitor suddenly took out his knife and wantonly cut a valuable canvas to pieces before one could stop him, would not this act be so far without the range of permitted access, without the scope of the spectator's authority, and unforeseen by the hirer, as to excuse me if I had not contributed wrongfully or negligently to the mischief? For otherwise I might almost as well have to make good every depredation of a burglar.

§ 147. **The same Subject; Driving by a Hirer's Servant.** — Whether such a distinction as to the scope of access holds universally true, or not, among those admitted to access by

¹ No positive adjudication is to be found on this point; but to such a conclusion appear to tend *Dansey v. Richardson*, 3 E. & B. 144; *Holder v. Soulby*, 8 C. B. n. s. 254; *Smith v. Read*, 6 Dal., 33.

the hirer, we find it applied in the case of a hired horse driven by a servant. For a servant's negligence, fraud, or deceit, committed in the usual and permitted course and scope of employment, his master must respond to third persons.¹ This holds true where one's driver turns or races his horse injudiciously, recklessly, or even intentionally, provided it be not wantonly;² and, in America, at least, even where the driving is in disregard of the owner's general instructions or special command.³ So, if a hirer's servant carelessly leaves a stable-door open, or the halter loose, whereby the horse escapes or is stolen, this shall charge the hirer, whether the party intrusted with the duty were a domestic or a friend.⁴ And so is it with one whom the hirer permits to ride.⁵

But, on the other hand, though distinctions may be often elusive, there is a plain repugnance shown in our late cases to hold an innocent master liable for such wanton and malicious acts of his servant as clearly transcend his authority. No express or implied authority to do what is positively wrong is to be countenanced; and hence a servant's wanton, malicious, and criminal acts with the thing or towards it are to be deemed his own, and the master can be held only in case of his contributory negligence or a voluntary participation.⁶ And since authority might be generally or specially conferred, a driver's wanton deviation from his special employment might expose only himself to the consequences;⁷ while taking the horse without permission certainly ought

¹ See Story Agency, §§ 452-457; Schoul. Dom. Rel. § 490.

² *M'Manus v. Crickett*, 1 East, 106; *Croft v. Alison*, 4 B. & Ald. 590; *Joel v. Morison*, 6 C. & P. 501; *McDonald v. Snelling*, 14 Allen, 290, and cases cited; *Philadelphia R. v. Derby*, 14 How. 468.

³ *Philadelphia R. v. Derby*, 14 How. 468.

⁴ Story Bailm. § 400; *Jones Bailm.* 89.

⁵ *Ib.*

⁶ See *Poulton v. South-Western R.*, L. R. 2 Q. B. 534; Schoul. Dom. Rel. § 491.

⁷ *Storey v. Ashton*, L. R. 4 Q. B. 476.

to.¹ Yet in all these instances the want of ordinary prudence in selecting the servant, or in intrusting him with the use of the thing, or in protecting what was hired, as indeed contributory negligence or misconduct in general on the master's part, would render the latter liable.²

For injury caused by the negligence of the bailor's own driver or servant, as in the case of careless driving, the bailee will not, of course, be held responsible, inasmuch as the agent's privity is with his own master. Hence, as Pothier and Sir William Jones agree, one who rides in a hired coach, which the letter's coachman drives, is free from risk, as concerns coach and horses, and needs only to be ordinarily careful of glasses, and the inside of the coach.³ And perplexing questions arise as to whether, in a given instance, the driver was under the letter's or hirer's control at the time injury occurred.⁴ These may best be discussed in a treatise on agency; and we only add that wherever the bailee is not responsible for the act of the driver causing mischief, the bailor ought to be able to hold the driver personally liable.⁵

§ 148. **Liability of Joint Hirers.** — If two persons jointly hire a horse, both may be answerable for the culpable negligence

¹ See *Green v. McNamara*, 8 C. B. N. S. 880; *Joel v. Morison*, 6 C. & P. 501; *Wright v. Wilcox*, 19 Wend. 343; *Evansville R. v. Baum*, 26 Ind. 70; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479; *Illinois Central R. v. Downey*, 18 Ill. 259; *Moore v. Sanborne*, 2 Mich. 519.

² It is true that, in most of these cases, the injury was to a stranger and not the bailor or the bailor's property; but the difference appears not essential in principle. In *Foster v. Essex Bank*, 17 Mass. 479, 502, the court pronounces such a criterion just, as respects any bailee for hire. And more directly in point are *Finucane v. Small*, 1 Esp. 315, and *Harris v. Nicholas*, 5 Munf. 483.

³ *Story Bailm.* § 403 *a*; *Jones Bailm.* 88, 89; *Pothier Contrat de Louage*, n. 196.

⁴ *Laughter v. Pointer*, 5 B. & C. 547; *Quarman v. Burnett*, 6 M. & W. 499; *Fowler v. Lock*, L. R. 10 C. P. 90; *Woodward v. Cutter*, 33 Vt. 49; *Hughes v. Boyer*, 9 Watts, 556; *Dyer v. Erie R.*, 71 N. Y. 228.

⁵ *Story Agency*, §§ 309-320; *Story Bailm.* § 404; *Schoul. Dom. Rel.* §§ 490, 491.

or misconduct of either.¹ But, if only one hires, while the other rides as a mere passenger or friend, taking no part in controlling the animal, it is the hirer only who should respond.² Nevertheless, others than the mere driver may have to respond, as for abetting and assisting the commission of some wrong and hurtful act; as, to take an extreme case, where one drives a hired horse to death, in racing with another party, who urges him on.³ But, while principal wrong-doers may all be held responsible together for the same bad act, a master cannot be sued jointly with his servant for an injury to the thing, which the latter commits in his personal absence.⁴

§ 149. **Hirer's Liability as to Third Persons.** — Of redelivery and the duty of yielding recompense, we shall speak presently.⁵ But, to close here, as concerns his duties, the hirer should, with respect to third persons and the general public, use the hired chattel with such honor and ordinary discretion and care, as to injure neither the person nor the property of any one wantonly or negligently.⁶

§ 150. **Hirer's Rights against his Letter; Right to use, etc.** — The hirer's rights occasion very little litigation. As between himself and his letter, he acquires an exclusive right to use the thing conformably to the mutual understanding, without hindrance or molestation, during his term, so long as he properly behaves. If the term be more than a precarious one, terminable at pleasure, the letter should, after once delivering the thing, refrain from whatsoever acts tend to interrupt his bailee's peaceable possession and unobstructed use.⁷

¹ *Davey v. Chamberlain*, 4 Esp. 229; *O'Brien v. Bound*, 2 Speers, 495; *Story Bailm.* § 399.

² *Ib.*; *Dyer v. Erie R.*, 71 N. Y. 228.

³ *Banfield v. Whipple*, 10 Allen, 27.

⁴ *Moreton v. Hardern*, 4 B. & C. 223; *Parsons v. Winchell*, 5 Cush. 592. See *Wright v. Wilcox*, 19 Wend. 343.

⁵ See, as to termination of this bailment, *post*, § 156.

⁶ See *Sullivan v. Scripture*, 3 Allen, 564, and general works on Torts.

⁷ *Story Bailm.* § 395; *Pothier Contrat de Louage*, n. 75, 77; *Hickok v. Buck*, 22 Vt. 149.

Receiving the chattel again for some temporary purpose, as to put it in repair, the letter is bound to return it when that purpose is accomplished;¹ and his creditors have no right, by attaching, to deprive the hirer of his beneficial interest.² Such, too, is the doctrine in hire for a precarious term; only that, by virtue of his right to put an end to the bailment at any time, the letter may retake possession without regard to the hirer's good or bad conduct.³

§ 151. **Whether the Letter warrants the Enjoyment, etc.**—Concerning the extent to which bailment for hired use may be said to imply a warranty, on the letter's part, against incumbrances, and for quiet enjoyment, our common law is silent. The civilians assert that an obligation exists sufficient, at all events, to indemnify the hirer, should a stranger legally put him out of possession.⁴ Even the lender of a thing must act honorably, delivering nothing as his property which he knows another owns and may reclaim;⁵ and, at our law, the hirer for a term, whom another, having a better title than his letter, lawfully dispossesses, ought in fairness, unless he specially assumed such risks of title, to be able to sue such letter as for breach of the bailment contract, or to recoup the damage against the claim of compensation.⁶ But, for a tortious disturbance or dispossession by the stranger, the hirer must have recourse to his remedy against the wrong-doer.⁷

§ 152. **How Expenses shall be borne.**—With respect to expenses about the hired thing, civilians lay it down that the letter is bound to keep the thing in order and repair suitable

¹ Roberts v. Wyatt, 2 Taunt. 268; Story Bailm. §§ 386, 395.

² Hartford v. Jackson, 11 N. H. 145.

³ Ib.

⁴ "*Ut præstet conductori frui licere*;" "*præstare, frui licere, uti licere.*" Pothier Contrat de Louage, n. 53, 54, 83; Story Bailm. §§ 383, 387.

⁵ Pothier Prêt à Usage, n. 79, 80; *supra*, § 68.

⁶ Story Bailm. §§ 383, 387. Every common-law lease of real estate imports a covenant, on the lessor's part, for quiet enjoyment. Taylor Land. & Ten. § 308; 1 Schoul. Pers. Prop. § 30.

⁷ Ib.

for the bailment purpose.¹ But the Roman *locatio-conductio*, we should remember, applied to real and personal property in an indiscriminate manner which the common law does not justify.² Extraordinary expense, too, such as the hirer might unexpectedly be compelled to incur, — as in the case of a horse taken sick on the journey, — should, as the civilians opine, be borne by the letter; though not, perhaps, if the hirer neglected notifying him when he might have done so.³ On all such points the common-law doctrine must as yet be left to conjecture;⁴ though the rational expectation of the parties, as evinced by their own words and conduct, usage, and other circumstances, will largely determine each case; considerations to which the civilians were not blind.⁵ To an issue of this kind, the rate and nature of the recompense intended is quite material, especially as to the incidental and foreseen expenses of the undertaking.⁶ But the unforeseen and extraordinary expense, as to which mutual understanding probably never closed, the law may well favor placing upon the letter, if his reversionary interest will be the more valuable for it, and the hirer was not at fault; but otherwise if the hirer was remiss,⁷ or gains all the substantial benefit by the outlay. If the letter was remiss, as where a stable-keeper lets a horse, knowing the animal to be sick and unfit for the purpose required, the hirer may well sue in damages, or recoup his needful outlay against the recompense.⁸ But the pressure for

¹ Pothier Contrat de Louage, n. 129, 130.

² Under our Anglo-Saxon system a lessee must pay his rent, even though the building be burned to the ground; nor need the lessor keep the premises in repair unless he expressly covenants so to do. Taylor Land. & Ten. §§ 327-331; 1 Schoul. Pers. Prop. §§ 31-33.

³ Pothier Contrat de Louage, n. 129, 131; Ersk. Inst. B. 3, tit. 1, § 23.

⁴ Story Bailm. §§ 388, 389, 392; 2 Kent Com. 586.

⁵ See Pothier Contrat de Louage, n. 107, 132; Story Bailm. § 388.

⁶ Handford v. Palmer, 2 B. & B. 359; Story Bailm. §§ 256, 393; *supra*, § 78.

⁷ Jones v. Morgan, 90 N. Y. 4.

⁸ See Harrington v. Snyder, 3 Barb. 380; 2 Kent Com. 586; Reading v. Menham, 1 Moo. & R. 234; Story Bailm. § 392.

immediate outlay should be strong, and opportunity be wanting for previous consultation with his bailor, to justify the bailee in expending largely without in some way securing permission.

§ 153. **Letter responsible for Letting injuriously.** — A letter for use is not only bound to exercise good faith, but he may be punished in damages, whenever he selects for the hirer a chattel which he knows is unsuitable and dangerous for the bailment purpose. Thus, a livery-stable keeper so far warrants his horses and carriages that, if the hirer, who trusted him and his superior knowledge, suffer because the thing hired prove otherwise, he must be indemnified;¹ nor matters it, if the hirer was not at fault, that the bad horse or carriage only contributed to the injury, or that the letter meant to deliver something else.² As sometimes expressed, the letter promises by implication that his horse is kind and suitable for the purpose, and not vicious.³ But the ground of liability appears to be not so strictly a warranty as that the hirer must trust to the letter's private knowledge of the thing's intrinsic qualities; for, where the injury to the hirer is caused by some hidden defect in the chattel, which careful examination could not have disclosed, the letter is excused.⁴ It may often be worth while to ascertain, in such connection, whether parties sustain the mutual relation of bailor and bailee, or of master and servant, since in the latter case one is less strictly held for occasioning bodily injury than in the former.⁵ The law of continental Europe appears to hold the letter even more strictly answerable than does our system, as to a disclosure of faults in the thing he lets to hire;⁶ for it regards the

¹ *Jones v. Page*, 15 L. T. N. S. 619, Ex.; *Fowler v. Lock*, L. R. 7 C. P. 272; *Horne v. Meakin*, 115 Mass. 326; *Hadley v. Cross*, 34 Vt. 586.

² *Horne v. Meakin*, *supra*. Especially is this true where the letter made no reasonable effort, after finding out his mistake, to correct it. *Ib.*

³ *Windle v. Jordan*, 75 Me. 149.

⁴ *Hadley v. Cross*, 34 Vt. 586.

⁵ See *Fowler v. Lock*, L. R. 7 C. P. 272.

⁶ *Pothier Contrat de Louage*, n. 110-115, 122, 124; *Story Bailm.* §§ 390, 391.

warranty obligation on his part so great as in many instances to forfeit the recompense, because of some unknown defect in the thing, for whose existence the hirer could not have sued him specially to recover damages.¹ Doubtless, a hirer who would, in his action, recover damages for his letter's negligence ought not to appear wanting in ordinary diligence to avert the injury complained of.

§ 154. **Right of Action and Damages as against the Public.**—As against the public, a hirer's right of action is more extensive than a borrower's; and his special property in the thing, founded in valuable consideration, enables him to sue all third parties in his own name for damages suffered in respect of the thing while in his rightful possession, whether it be in tort or for breach of some privity with him.² It is no excuse to the tortious invader of a hirer's rights that the letter has not interposed, nor the hirer made good the damage.³ And, if the hirer has done nothing so inconsistent with the undertaking as to justify his letter in treating the bailment as at once ended, and the bailment is not precarious, the letter cannot, as it appears, interpose to sue the stranger himself.⁴ At all events, the hirer is, under these circumstances, the proper party to sue in trover or replevin, while case would be the letter's technical remedy under the old practice, as for an injury to the reversion.⁵ But, if the hirer recover full damages, he should satisfy his bailor from the fund.

Where the peculiar situation is such as might expose a

¹ *Ib.*; Dig. 19, 2, 19.

² *Nicolls v. Bastard*, 2 C. M. & R. 659; *Story Bailm.* § 394; *Woodman v. Nottingham*, 49 N. H. 387; *Rindge v. Colerain*, 11 Gray, 158; *White v. Bascom*, 28 Vt. 268; *Bliss v. Schaub*, 48 Barb. 339; *McGill v. Monette*, 37 Ala. 49; *Hopper v. Miller*, 76 N. C. 402.

³ *Brewster v. Warner*, 136 Mass. 57. Here injury was done to a hired team, and the hirer had not yet paid for the repair.

⁴ *Upham, J.*, in *Drake v. Redington*, 9 N. H. 246; *Mears v. London*, &c. R., 11 C. B. N. s. 850, 854; *Clarke v. Poozer*, 2 M'Mull. 431.

⁵ See *Howard v. Farr*, 18 N. H. 457; *White v. Griffin*, 4 Jones (N. C.), 139.

defendant to the risk of double recovery to a large amount, or hazard unduly the owner's share of a fund placed under his bailee's sole control, the hirer's own right of recovery is sometimes restricted to his own interest, or the court will compel him to give security in respect of his bailor's share;¹ nor has the bailor in such case been denied the privilege of suing apart for what may be called the permanent injury to the thing.² Wherever the bailment has ended, or (as under a term precarious) the bailor has an immediate right to terminate it, and resume possession, he may sue a stranger by virtue of such termination.³ A full and rightful recovery of damages by either hirer or letter commonly bars the other party's action against the stranger;⁴ and where bailor and bailee are in accord as to which shall sue, the injuring party cannot complain.⁵

§ 155. **Special Contract may affect the Hire.**—By special contract, not only may the use of the thing be restrained as to time or method of enjoyment, but the bailor may gain security against stated perils, or, indeed, against all loss whatsoever.⁶ But as no hirer for use is presumed to intend undertaking the risks of a special insurer, every contract which tends thus to enlarge the scope of his legal responsibility ought to be construed, if possible, in his favor.⁷ Nor should

¹ *Mears v. London, &c. R.*, 11 C. B. N. S. 850; *Eldridge v. Adams*, 54 Barb. 417. For a corresponding rule in admiralty practice, see *The Minna*, L. R. 2 Ad. & Ec. 97.

² *Mears v. London, &c. R.*, *supra*.

³ *Hurd v. West*, 7 Cow. 752; *Drake v. Redington*, 9 N. H. 243; *Howard v. Farr*, 18 N. H. 457; *Clarke v. Poozer*, 2 M'Mull. 434; *Felton v. Hales*, 67 N. C. 107. And see *supra*, §§ 80, 115.

⁴ *Story Bailm.* § 394.

⁵ *Brewster v. Warner*, 136 Mass. 57; *Dumas v. Hampton*, 58 N. H. 134.

⁶ See *Collins v. Bennett*, 46 N. Y. 490; *Austin v. Miller*, 74 N. C. 274. In *Harvey v. Murray*, 136 Mass. 377, one who hired a piano, agreeing to return it "in as good order as when received, customary wear and tear excepted," was held liable (by a harshly literal interpretation of the contract) for an injury caused when the house was blown down.

⁷ *Reading v. Menham*, 1 Moo. & R. 234; *Field v. Brackett*, 56 Me.

a dubious engagement be held to narrow the natural use of the thing; and where, for instance, the letter of a carriage which holds two seats claims that the hirer promised only one should be occupied, he should make strict proof of such promise.¹ Any special stipulation, in short, which does not militate against sound policy and good morals may be made by the bailment parties; and this, as in other bailments, whether it lessens or enhances the usual risks of the bailee; but it must be established by proof.

§ 156. **Bailment how terminated.**—III. Termination of the bailment. The bailment for hired use, like that of gratuitous loan, may terminate in a variety of ways: by accomplishment of the bailment purpose or expiration of the period of hire; by the thing's entire loss or destruction; by rescission of the contract, whether by mutual consent or because of misuse or other gross violation of duty by the one party, of which the other rightfully avails himself; and by operation of law, as where the hirer becomes full owner of the thing. Whatever the method of termination, the bailment parties are not absolved from their past obligations, but must make adjustment upon the usual contract principles.²

Whether the death of either party will operate a dissolution of the bailment is not definitely settled; but such seems not to be the general result where the party deceased had hired for other than a strictly personal use. The Roman and French law properly treats hired use for a fixed term as continuing, by means of personal representatives, beyond the death of bailor or bailee; but with less reason regards, as it appears, the death of one party, apart from the act of his representative or the other party, a sufficient dissolution of

121; *Ames v. Belden*, 17 Barb. 513; *Hyland v. Paul*, 33 Barb. 241; *Conwell v. Smith*, 8 Ind. 530; *McEvers v. Steamboat Sangamon*, 22 Mo. 187.

¹ *Harrington v. Snyder*, 3 Barb. 380. And see *supra*, § 106.

² Story Bailm. §§ 418-420; Pothier Contrat de Louage, n. 308-310; Civil Code of Louisiana (1825), art. 2698-2700.

the relation, wherever the hired use was only for a term precarious.¹ Resort may be had to the mutual understanding of the parties, if this be sufficiently explicit, for resolving the doubt in each particular instance.

§ 157. **The same Subject ; how Hirer or Letter is put in Default.**—If it be uncertain whether a bailment for hired use had terminated or no, the bailor should, before regarding his bailee as in default, make a demand or notify him to return the thing. But no demand or notice is needful as the preliminary of bringing his suit where the bailment was distinctly fixed for a certain time, and the period has lapsed without the grant of further extension ;² nor where the thing has been converted wrongfully or destroyed.³ On the other hand, the bailee has the corresponding duty of tendering the thing back and offering whatever recompense may be just.

§ 158. **Hirer's Duty to restore and make Recompense.**—Upon termination of the present bailment, the hirer has two general duties to perform : (1) to deliver the thing back or over, which is most commonly to restore it to his letter ; (2) to make final recompense for its use, if not made in advance.

§ 159. **Duty to restore or deliver over considered.**—1. The thing should be restored in as good plight as it was when received, except for that deterioration which ensues, in the course of using, from ordinary wear and tear, and for any injury or loss which may have occurred without culpable negligence or misconduct on the hirer's part. And the delivery should be promptly made, to the letter personally, or to his agent duly empowered, his personal representative, or transferee, according to the circumstances. The hirer should volunteer no claim of title adverse to his letter on behalf of

¹ Dig. 19, 2, 4; Pothier Contrat de Louage, n. 317; Story Bailm. §§ 419, 420.

² *Morse v. Crawford*, 17 Vt. 499; *Ross v. Clark*, 27 Mo. 549; *Negus v. Simpson*, 99 Mass. 388; *Benje v. Creagh*, 21 Ala. 151.

³ *Morse v. Crawford*, 17 Vt. 499.

himself or another, nor hire under a title which he knows to be infirm and then set up the infirmity against his bailor afterwards;¹ though, like any other bailee, he may justifiably protect himself against claims of ownership, preferred by third persons, which have been so brought to his notice while he holds custody, that he cannot, without peril, ignore them.² The actual accomplishment of the bailment purpose, usage, or the parties' express contract, may determine when the hirer is bound to redeliver; otherwise redelivery should promptly follow the letter's rightful demand.³ Failing to return the thing hired amounts, unless satisfactory excuse is given, to conversion on the bailee's part so as to justify the recovery by action of damages for the detention, besides the compensation due.⁴ But the letter for a fixed term might, if his hirer failed to redeliver at the appointed term, elect to treat the bailment as still continuing or renewed at the same rate of hire;⁵ and the inaction of the parties might readily be construed into an agreement to this effect.

An owner's dominion ought to be so greatly respected by a mere usufruct, that the hirer, who accepts with permission to sell and credit the proceeds on a debt which the bailor owed him, must deliver to the letter's transferee, and forego his own privilege, if the bailor finds a purchaser before him, and himself sells the thing to a stranger.⁶

¹ *Supra*, § 118; *Davies ex parte*, 19 Ch. D. 86.

² The demand of one to whom the bailor has mortgaged the chattel since delivery, and who is entitled to its possession, may justify the hirer in refusing redelivery to his letter. *European Royal Mail Co. v. Royal Mail Steam Packet Co.*, 10 C. B. N. S. 860. And see *Erwin v. Arthur*, 61 Mo. 386; *supra*, § 118.

³ *Cobb v. Wallace*, 5 Cold. 539.

⁴ *Ware in re*, 5 Ch. D. 866; *Vaughan v. Webster*, 5 Harring. 256; *Benje v. Creagh*, 21 Ala. 151; *Story Bailm.* § 414. And see, as to the measure of damages for failing to restore, *Negus v. Simpson*, 99 Mass. 388.

⁵ *Benje v. Creagh*, 21 Ala. 151.

⁶ *Erwin v. Arthur*, 61 Mo. 386.

§ 160. **Duty of Final Recompense considered.** — 2. Recompense for the use of the thing, which is commonly, but not of necessity, in money, ought to be duly rendered in accordance with the hirer's undertaking; and this, doubtless, may have involved payment in advance, though recompense when the bailment ends is more common. Definite agreement may have fixed a definite compensation; otherwise, that is due which reason and usage prescribe. The civil law distinguishes in like manner between tacit and express compensation;¹ and, in the Roman jurisprudence, circumstances under which the hirer had, without fault, become deprived of his beneficial use of the thing for the whole or a substantial portion of his term, might be alleged; so that, according as justice required, the letter would be allowed a proportionate part, or the whole, or none whatever.² Questions of this sort are yet novel to our courts; but the beautiful and consistent doctrine of apportionment found always in Anglo-Saxon law a sterile soil, and with us where one contracts to do an entire thing for a specified recompense, there can be, strictly speaking, no apportionment thereof. Yet, if one hire for no particular term, or with only a tacit understanding as to the recompense, the rule of apportionment might fairly apply; for, independently of modern legislation, which has wrought much change, courts are found disposed to relax of late, out of respect to the declared or presumed intention of the bailment parties themselves; and intention ought, of course, to be conclusive of the right of recompense under any emergency.³

§ 161. **The same Subject.** — Agreeably to the rule which permits of the mutual rescission of contracts, a hirer who returns the thing before his term has expired, need not pay hire-money beyond the time the owner lets it anew or sells

¹ Pothier *Contrat de Louage*, n. 125-128, 134, 141, 144; Story *Bailm.* §§ 391 *b*, 416, 417; Colquhoun *Rom. Civ. Law*, § 1674.

² *Ib.*

³ See 3 Kent *Com.* 470, 471 and *n.*; Story *Bailm.* §§ 417 *a*, 418 *a*.

it.¹ And any sum which the letter may receive by selling the thing after the hirer has returned it carelessly injured is a fair offset to the letter's claim of damages against him as for a total loss.² A hirer at fault may doubtless have to make good the damage occasioned by his remissness, in addition to giving the promised recompense.³ Yet our law is commonly satisfied with making the injured party whole under his contract; and on a familiar principle, applied in other relations of life, he who pays as for a total loss or destruction of the thing ought to be subrogated to the rights of the former owner.⁴

¹ *Wright v. Melville*, 3 C. & P. 542.

² *Austin v. Miller*, 74 N. C. 274.

³ *Bigbee v. Coombs*, 64 Mo. 529.

⁴ *Story Bailm.* § 414.

CHAPTER IV.

PLEDGE OR PAWN.

§ 162. **Nature of Pledge or Pawn as a Bailment.** — By pledge or pawn is denoted the bailment of a chattel, as security for some debt or engagement.¹ Transactions like these belong to the mutual-benefit class under consideration; the benefit to the pledgor or pawnor being represented by that debt or engagement, which he is bound to make good, and the benefit to the pledgee or pawnee consisting in the additional means thus afforded him of obtaining the desired satisfaction or fulfilment thereof.

§ 163. **Historical Development of the Transaction.** — The common law of pledge or pawn has grown apace with the development of personal property as a species of wealth, every newly created class of such property giving the subject a fresh expansion. Money, for obvious reasons, must always have been an inappropriate, though not positively unfit, subject-matter of pawn, being the end, rather than the means, of security; and, as for ships and vessels, our maritime law derived names and its hypothecary system from the codes and usage of those Mediterranean powers with whom England carried on her infant commerce.² If a nobleman had been forced, in the extremity of war, to leave his family plate and jewels with the lender upon usury, in order to get the means of equipping his followers, he scored his account, when he could, upon his creditor's flesh. Borrowers and lenders alter-

¹ Bouv. Dict. "Pledge," "Pawn;" Story Bailm. §§ 7, 286; 2 Kent Com. 577; 2 Bl. Com. 451, 452.

² See 1 Schoul. Pers. Prop. §§ 304, 442; 1 Pars. Shipping, c. 1; Abb. Shipping, preface.

nated in hatred and fear of one another, as our pawn business anciently went on; and, socially, they were strangers, the capitalist being the inferior in caste. But most Anglo-Saxon transactions of this kind, upon personal chattel security, three centuries ago, were petty; and, managed as they were, underhand and at oppressive rates, we should have found the lenders small capitalists, usually of Jewish extraction, and their customers needy wretches, at the last pinch, who shrank from disclosing their names. For individuals of wealth who aspired to rank might invest on bond and mortgage security, or, in England, take attendant terms,¹ as their titled debtors enabled them to do, and purchase lands; and though ready to buy things personal, according to their needs, such capitalists so shunned putting out their money on such security that, as a rule, borrowers on pledge had to visit the pawnbroker's shop.

But ere this day, loans on the security of chattels personal have become of constant and open occurrence in our community, largely engaging the attention of bankers and investors. And the social rise of this transaction is curiously indicated by the changing use of English terms to denote it. The terms "pawn" and "pledge" in our language appear interchangeable, and law-writers so employ them.² But "pawn," which is the more characteristic of the particular transaction, and was almost always applied in the humbler days of this bailment, keeps its unpleasant savor; for the modern disposition has been to use, in its stead, "pledge," a term admitting of various senses, some of them truly Norman, where the transaction may be detached from the three golden balls.

§ 164. "Collateral Security" in this Connection. — And, once more, commercial paper and personalty of other incorporeal kinds are now found so highly convenient for pledge,

¹ 1 Schoul. Pers. Prop. § 43.

² See 2 Bl. Com. 157; 3 ib. 274, 280.

that brokers and bankers have put us lately to using still another term, that of "collateral security," or "collaterals." We may find this third expression used in some of the late reports, in an uncertain way, as though courts were bewildered in distinguishing between the pledge and chattel mortgage, or wished to use some convenient term which did not commit them to a distinction.¹ From some judicial expressions, one might infer that a transfer, by way of collateral security, was thought something altogether distinct from a pledge;² but the better view is that "collateral security" embraces, in the broadest sense, both pledge and chattel-mortgage transactions, while more appropriately applied to the former class, and in the stricter phrase to pledges of incorporeal personalty alone. "Collateral security" is certainly the most patrician of expressions applied to the present bailment, though its legal significance is not precise. As a chancery phrase "collateral security" came long ago in other connections to denote some security given in addition to the principal security. Where one borrows money on mortgage and also deposits bonds, there may arise a strict loan on collateral security. But the colloquial use of these words is not so exact.³ Giving one's simple promissory note for the loan, and bonds, stock, etc., for the security, might seem a proper instance under the same head; and hence, perhaps, the true origin of this mercantile use of the phrase. But no such rigid construction is practically enforced even from the bench; for as our "collateral security" is literally something added to the "principal security," it may be doubted whether one's own note alone can fairly be termed a "principal security" of the debt; though certainly it ought to be, if the note itself were indorsed.

¹ *Fraker v. Reeve*, 33 Wis. 85; *Smithurst v. Edmunds*, 14 N. J. Eq. 408; *First Nat. Bank v. Kelly*, 57 N. Y. 34.

² See *Coulter, J., in Chambersburg Ins. Co. v. Smith*, 11 Penn. St. 120.

³ See 16 Ch. D. 211. 217; 11 Penn. St. 120.

And now that pledge may be made of great things as well as small, of mercantile as well as household articles, the capitalist who advances money on staple merchandise, bonds, or commercial paper refuses blood brotherhood with the primitive lender upon garments, furniture, and personal ornaments; and while the pawnbroker still plies, under license, the individual trade with misery and humble station, a corporation, organized for a wider reach of the same business, sinks the pawn, and is styled a "Collateral Loan Company," or "Merchandise Security Bank."

§ 165. **Use of Words "Pledgor" and "Pledgee."**—To all of these bailees, alike in their general pursuit, and to private parties who may, in special cases, take chattel security for accommodation, we shall apply in this chapter the convenient term "pledgee;" the corresponding party being styled the "pledgor."

§ 166. **Roman "Pignus" and "Hypotheca" compared.**—Our English pawn or pledge corresponds with the Roman *pignus*, a word whose origin civilians have thought significant of the manual delivery which necessarily accompanied the transaction; for if possession remained with the debtor, although by naked agreement the property was placed in security, the civil law styled it *hypotheca*.¹ Some, however, have said that the difference between *pignus* and *hypotheca* was one of sound only.² Like our pledge, the Roman *pignus* appears to have been confined to personal property or movables.³

Our commercial law speaks of "hypothecating" ships and vessels, rather than "pledging" or "mortgaging" them; and this (naturalizing civil rules and civil terms together) because a bottomry bond makes the ship's keel or bottom a creditor's

¹ 2 Kent Com. 577, 578; Dig. 50, 16, 238; Inst. 4, 6, 7; Story Bailm. § 286.

² See Dig. 20, 1, 5, 1; Story Bailm. § 286.

³ *Ib.* Lord Holt likened our pawn or pledge to the Latin *radium*; an inaccuracy not strange for his day. See *Coggs v. Bernard*, 2 Ld. Raym. 909, 913; 2 Bl. Com. 157.

security, without requiring a bailment transfer and retransfer of visible and tangible possession, which would be troublesome, even if practicable, in such a case.¹

§ 167. **Pledge distinguished from Chattel Mortgage.** — Pledge is to be distinguished from the chattel mortgage, which it much resembles. Every chattel mortgage, like a mortgage of real estate, carries over to the party whose security is intended, a transfer of legal title to the property, with a proviso by way of defeating it; and the mortgagee becomes, technically speaking, the owner of the thing, subject to a condition of title divestment upon the mortgagor's faithful and complete performance of the main undertaking whose security was intended.² But, under a pledge, the secured party is a mere bailee of the thing, while the main undertaking ripens. Nor is actual possession of the property placed in security so essential to a mortgagee, who stands upon a transferred title, as it is to a pledgee, whose strength consists in possessory rights.³ This theoretical distinction, however, is not well kept up in modern practice; for equity subjects all mortgages to foreclosure and a possible right of redemption, so that, pending full performance by one party, the other has hardly a more available *jus disponendi* than any pledgee. Moreover, our local legislation tends constantly to

¹ 1 Pars. Shipping, 132, 133; *The Grapeshot*, 9 Wall. 129; 1 Schoul. Pers. Prop. § 442. And see *Smith v. Weguelin*, L. R. 8 Eq. 198; *Latham v. Bank of India*, L. R. 17 Eq. 205.

² *Atwater v. Mower*, 10 Vt. 75; *Brown v. Bement*, 8 Johns. 96, per Kent, C. J.; 1 Schoul. Pers. Prop. §§ 415, 416; Story Bailm. § 287; *Kimball v. Hildreth*, 8 Allen, 168; *Leach v. Kimball*, 34 N. H., per Bell, J.; U. S. Dig. 1st Series, Bailment, 165; *Parshall v. Eggart*, 52 Barb. 367. By a mortgage, the granted property passes to the grantee subject to be revested in the grantor by the performance of the condition. By a pledge, the pledgee acquires a special property only in the article pledged, the general title remaining in the pledgor; the pledgee has only a lien, and possession is essential. *Per curiam*, in 5 Pick. 59. And see *Thompson v. Dolliver*, 132 Mass. 103.

³ *Coty v. Barnes*, 20 Vt. 78; *Woodman v. Chesley*, 39 Me. 45.

assimilate the two transactions.¹ In fine, it has already come to this, that a chattel mortgage, where the mortgagee is out of possession, and relies upon a written instrument for enforcing his rights whenever needful, is much the same as the Roman *hypotheca*; while, on the other hand, the posture of a chattel mortgagee who holds possession of the thing before a breach of condition, is not unlike that of a pledgee or custodian for mutual benefit.²

Possession of the thing pledged is so needful to the pledgee, that any written instrument turning out personal property as "security" for a debt, but whose terms contemplate leaving the original owner still in possession, as such will be presumed to evince a mortgage rather than a pledge transaction.³ But it is the settled law of some States that a bill of sale intended for security shall operate as a pledge rather than a mortgage, notwithstanding the pledgor keeps possession as the pledgee's agent.⁴ Again, a document which states that certain goods are deposited to secure the repayment of money lent, and contains a clause giving, in default of payment, the power of sale, is held to import a pledge, not a mortgage.⁵ And, where a mortgagor of chattels makes a new contract, promising to deliver the mortgaged chattels with other goods to the mortgagee as security for the original debt, and delivers accordingly, the mortgagee will become a pledgee under the new contract.⁶ A receipted bill of parcels for carriages, which on its face purports to be "for security for

¹ Rowley v. Rice, 10 Met. 7; Story Bailm. § 288 n., Rawson, *in re*, 2 Lowell, 519; Gay v. Moss, 34 Cal. 125.

² See Story Bailm. § 287; Brown v. Bement, 8 Johns. 96.

³ Coty v. Barnes, 20 Vt. 78; Woodman v. Chesley, 39 Me. 45; Whit-ting v. Eichelberger, 16 Iowa, 422.

⁴ Rawson, *in re*, 2 Lowell, 519. See *post*, as to delivery, in this chapter.

⁵ Attenborough v. Commissioners, 33 E. L. & Eq. 413.

⁶ Rowley v. Rice, 10 Met. 7. And see Hudson v. Wilkinson, 45 Tex. 445; Doak v. Bank of State, 6 Ire. 309. Where the transaction shows that one purchased the legal title, assuming a security, he is not a mere pledgee. Foster v. Magill (Ill.), 8 N. E. 771.

indorsed notes and cash," is held to be a pledge and not a mortgage.¹ So is a chattel given as security, even though transferred by an absolute bill of sale or by a contract stipulating that the pledge shall be irredeemable.² And there are cases which present a peculiar contract between the parties by way of security, whose special stipulations must govern the conduct of the parties, though their essential relation be that of pledgor and pledgee.³

§ 168. **The same Subject.** — A leading principle to be here deduced is, that an actual or constructive change of possession, where chattels are given in security, better comports with the character of pledge than of chattel mortgage. And, apart from the question of changing possession, if the transaction for security imports the mere giving in security, with no immediate change of title, it will be presumed a pledge rather than a mortgage; while, on the contrary, if it assumes to transfer the legal title at once by intendment to the creditor or obligee, accompanied perhaps with terms of defeasance, and yet so that the title shall become absolute in him through the other's mere non-performance of his condition, then there is a mortgage instead of a pledge.⁴ These are the two decisive tests, so far as tests to meet the case remain in English law at all. They seem, on the whole, to indicate a judicial preference for pledge over the chattel mortgage; for here the actual transaction, if an honest one, is better upheld and the mutual rights are better guarded. In security transfers of certain incorporeal chattels, like stock, whose mode of delivery is peculiar,

¹ *Thompson v. Dolliver*, 132 Mass. 103.

² *Morgan v. Dod*, 3 Col. 551.

³ *Milliken v. Dehon*, 27 N. Y. 364; *Murdock v. Columbus Ins. Co.*, 59 Miss. 152. And see *British Columbia Bank v. Marshall*, 8 Sawyer (U. S.), 229.

⁴ *Atwater v. Mower*, 10 Vt. 75; *Smith v. Beattie*, 31 N. Y. 512; *Leach v. Kimball*, 34 N. H. 568; *Shaw v. Wilshire*, 65 Me. 485; 1 Schoul. Pers. Prop. § 416; *Brewster v. Hartley*, 37 Cal. 15; *Acker v. Bender*, 33 Ala. 230; U. S. Dig. 1st Series, Mortgages, 4361, 4362; *British Columbia Bank v. Marshall*, 8 Sawyer, 229.

the border line will often be found exceedingly delicate.¹ Intent of the parties, however, must govern in all such transactions. Fortunately, however, it is chiefly on the lesser attributes of such transactions—compliance, for instance, with statute formalities of registration or the stamp acts²—that these distinctions of pledge and chattel mortgage are thus far pressed in the courts: and the modern English law of collateral security proceeds mainly upon the broader demarcation which separates, according to the intendment of the contract for chattel security, secured parties in possession and secured parties out of possession. Should any collateral creditor who had honestly omitted taking possession of the thing appear justified, under some contract of dubious import, in making such omission, we presume the security transaction would be construed a chattel mortgage rather than a pledge, so as to save his rights against the public unimpaired. But, as we shall presently see, it is very important to a pledgee to keep and retain possession, in order that his equity may remain superior to that of others than the pledgor himself, for affecting the personalty in question. As more particularly between the parties themselves, a difference of procedure for enforcing the security on default of the debtor or obligee; and meanwhile a difference of personal responsibility as concerns the thing itself, because custody is transferred in the one case and not in the other,—these remain the fundamental points of separation between these two great classes of chattel security transaction; classes for which the Roman *pignus* and *hypotheca* appear better fitting epithets on the whole than the English “pledge” and “chattel mortgage.”³

¹ See *Wilson v. Little*, 2 Comst. 443; *Brewster v. Hartley*, 37 Cal. 15.

² See, *e. g.* *Rawson, in re*, 2 Lowell, 519; *Attenborough v. Commissioners*, 33 E. L. & Eq. 413; 17 Q. B. D. 690.

³ See *Poste Gaius*, III. 90, 91, 303. It is, however, to be observed that our courts of law look at no other owner than the mortgagee under a chattel mortgage whose condition has not been performed, unless the local statute has otherwise prescribed; while courts of equity have done

§ 169. **Transfer apparently absolute shown to be intended for Security.** — We may add that in determining between an out-and-out transfer of personal property, and its transfer for security, courts leave the intention of the parties very freely open to interpretation, notwithstanding the writings which may have passed, and their literal expressions. Receiving negotiable paper for an existing indebtedness looks like accepting absolutely that mode of payment; yet the parties may show that the paper was taken only as collateral security for the debt.¹ And often has a bill of sale, or a transfer certificate of stock, or the written assignment of an incorporeal right, absolute on its face, been shown to be intended only for a pledge or chattel mortgage, by some other writings, or even by the mere conduct of the parties and parol evidence.² Transactions thus construed will be treated accordingly; nor should one conclude that parties meant a conditional sale, where the facts tended rather to establish the creation of security.³ For while real-estate transfers require documents

little here to mould the law to their own theory, as compared with their constant interposition where real-estate mortgages are concerned. And hence this practical difference has widely obtained between mortgages of real estate and mortgages of personal property, though more, perhaps, for the past than the future: that those of the former kind follow the equity rule regardless of form, so as to confer no legal title at once upon the mortgagor, but to serve rather as mere security until breach of condition; whereas those of the latter kind pass the legal title at once to the mortgagee subject to defeasance, agreeably to the legal rule. See *Jones Chattel Mortgages*, § 1.

¹ *Comstock v. Smith*, 23 Me. 202; *M'Lean v. Walker*, 10 Johns. 471; *Partee v. Bedford*, 51 Miss. 84; *Wood v. Matthews*, 73 Mo. 477.

² *Caswell v. Keith*, 12 Gray, 351; *Smith v. Beattie*, 31 N. Y. 542; *Fuller v. Parrish*, 3 Mich. 211; *Campbell v. Parker*, 9 Bosw. 322; *Houser v. Kemp*, 3 Penn. St. 208; *Hudson v. Wilkinson*, 45 Tex. 445; *Wilson v. Little*, 2 Comst. 443; *Morgan v. Dod*, 3 Col. 551; *Rohrle v. Stidzer*, 50 Cal. 207; 1 Schoul. Pers. Prop. § 417, and cases cited.

³ *Williamson v. Culpepper*, 16 Ala. 211. And see, as to chattel mortgages, 1 Schoul. Pers. Prop. §§ 414, 442; U. S. Dig. 1st series, Mortgages, 4370, 4396. But local statutes which reduce the scope of parol evidence to establish a pledge are found. 32 La. Ann. 586.

in writing and do not admit of parol proof, it is the reverse with transfers of personal property.

Whether one is a purchaser or pledgee depends upon the true intent of the transaction. Thus, where one gives personal property to his creditor to sell and apply to the payment of a debt already due, the creditor is not a purchaser but a pledgee.¹

§ 170. **Classification of the Present Chapter.**—We proceed to discuss the law of pledge under the following general heads: I. The pledge contract. II. Delivery in pledge. III. Bailment in pledge pending full accomplishment of the secured undertaking. IV. Bailment in pledge on the pledgor's default, or upon fulfilment of the secured undertaking.

§ 171. **The Pledge Contract, and its Essentials.**—I. The pledge contract. To the pledge contract are these three essentials: (1) A subject-matter; (2) A debt or engagement; (3) Mutual assent that this subject-matter shall be handed over to secure payment or fulfilment of this debt or engagement. Let us examine these essentials in detail.

§ 172. **First Essential; Subject-matter of Pledge.**—1. As to the subject-matter. In pledge, as in all other bailments, our transaction is necessarily confined to personal property. And of personal property, except for the peculiar rules of maritime law which are applicable to shipping, all kinds which are visible and tangible may be pledged; and, besides, the various incorporeal species, so far, at least, as concerns those which are evinced by instruments in writing, whereby a transfer of possession may take place.² In the earlier days of our law, only corporeal kinds, and those a few of the simple sort, were put in pawn; and in the leading case of *Coggs v. Bernard*, Lord Holt is found laying down the law with particular reference to jewels, wearing-apparel, and domestic animals.³ No

¹ *Harris v. Lombard*, 60 Miss. 29.

² 2 Kent Com. 577; Story Bailm. § 290; cases *infra*. And see *Kemp v. Westbrook*, 1 Ves. Sen. 278.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 917.

such brief list would now avail; for courts of this day constantly recognize the interchange in pledge, not only of merchandise and household goods of every modern description,¹ but also of incorporeal chattels.

Among such incorporeal chattels may be mentioned, bills and notes;² other negotiable and *quasi* negotiable instruments, like coupon bonds and government securities;³ municipal claim vouchers;⁴ shares of stock, and scrip certificates;⁵ a stock-margin;⁶ title deeds;⁷ a savings-bank deposit;⁸ a judgment;⁹ a bond with warrant to confess judgment, together with the judgment thereon;¹⁰ bonds secured by a mortgage on personal property and corporate franchises;¹¹ and chattel mortgages of every description.¹² Even a lease may thus be taken,¹³ for leases are but chattels real; or a

¹ *Stearns v. Marsh*, 4 Denio, 227; *Houser v. Kemp*, 3 Penn. St. 206; *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

² *Garlick v. James*, 12 Johns. 146; *Appleton v. Donaldson*, 3 Penn. St. 381; *White v. Phelps*, 14 Minn. 27; *Louisiana State Bank v. Gaiennie*, 21 La. Ann. 555.

³ *Donald v. Suckling*, L. R. 1 Q. B. 585; *Goodwin v. Robarts*, 1 App. Cas. 476; *Strong v. Nat. Bank Assoc.* 45 N. Y. 718; *Morris Canal Co. v. Lewis*, 1 Beasl. 323; *Loomis v. Stave*, 72 Ill. 623; 4 Mo. App. 59; *Texas Banking Co. v. Turnley*, 61 Tex. 365. And see 9 Mod. 278; 2 Atk. 303.

⁴ *Talty v. Freedman's Savings Co.*, 93 U. S. 321.

⁵ *Halliday v. Holgate*, L. R. 3 Ex. 299; *Langton v. Waite*, L. R. 6 Eq. 165; *Wilson v. Little*, 2 Comst. 443; *Worthington v. Tormey*, 34 Md. 182; *Conynghan's Appeal*, 57 Penn. St. 474; *Pinkerton v. Railroad*, 42 N. H. 424; *Heath v. Silverthorn Co.*, 39 Wis. 147; *Stone v. Brown*, 54 Tex. 330.

⁶ *Markham v. Jaudon*, 41 N. Y. 235.

⁷ *Kerr, in re*, L. R. 8 Eq. 331; *English v. McElroy*, 62 Ga. 413.

⁸ *Boynton v. Payrow*, 67 Me. 587.

⁹ *Hanna v. Holton*, 78 Penn. St. 334.

¹⁰ *Ib.*

¹¹ *White Mountains R. v. Bay State Iron Co.*, 50 N. H. 57; *Potter v. Thompson*, 10 R. I. 1.

¹² *Fraker v. Reeve*, 36 Wis. 35; *Jerome v. McCarter*, 94 U. S. 734.

¹³ *Dewey v. Bowman*, 8 Cal. 145. And see *Briggs v. Jones*, L. R. 10 Eq. 92. A tenant may pledge his furniture to the landlord for his rent. *State v. Adams*, 76 Mo. 605.

mortgage of real estate, which before foreclosure is now to be ranked with personal property;¹ or unlocated land certificates.² A life-insurance policy may be taken in pledge for security, by mutual consent; which transaction, however, is to be distinguished from that of insuring the debtor's life for the protection of the creditor, at the latter's sole instance.³ And so is it with fire or marine insurance policies.⁴

That which is incapable of delivery cannot, logically speaking, be the subject-matter of a pledge; but since money rights, not negotiable, or mere choses in action, may at least be assigned, so that delivery of the muniment or voucher shall answer the purpose of a bailment, this reservation is unimportant in modern practice.⁵ The modern civil law here agrees with us in substance; and to the same purport, apparently, was the Roman law, notwithstanding some equivocal expressions to be found in the Digest.⁶

§ 173. **The same Subject.** — The pledge of an indorsed bill of lading of goods on transit by land or water transfers, under mercantile usage of the present day, the special property therein against third parties, as well as against the pledgor himself.⁷

¹ *Campbell v. Parker*, 9 Bosw. 322; *Jerome v. McCarter*, 94 U. S. 734; 1 Schoul. Pers. Prop. § 44; 8 Cal. 145.

² *Stone v. Brown*, 54 Tex. 330.

³ *Bruce v. Garden*, L. R. 5 Ch. 32; *Edwards v. Martin*, L. R. 1 Eq. 121; *Soule v. Union Bank*, 45 Barb. 111; *West v. Carolina Life Ins. Co.*, 31 Ark. 476; *Hakes v. Myrick (Io.)*, 23 N. W. 574.

⁴ *Latham v. Chartered Bank of India*, L. R. 17 Eq. 205; *Merrifield v. Baker*, 9 Allen, 29.

⁵ See *Welch v. Mandeville*, 1 Wheat. 236; 1 Schoul. Pers. Prop. §§ 72-82; *Gay v. Moss*, 34 Cal. 125; *Talty v. Freedman's Savings Co.*, 93 U. S. 321; *Dunn v. Meserve*, 58 N. H. 429. One's interest in a limited partnership may be pledged. *Collins's Appeal*, 107 Penn. St. 590.

⁶ 1 Domat B. 3, tit. 1, § 1, art. 23; Pothier Contrat de Nantissement, n. 6, with citations; Story Bailm. § 290 a; *Clay v. Creditors*, 9 Mart. 519.

⁷ *Hathaway v. Haynes*, 124 Mass. 311; *Marine Bank v. Fiske*, 71 N. Y. 353; *Taylor v. Turner*, 87 Ill. 296.

And a warehouse receipt may be given in pledge so as to carry the goods which it represents.¹

§ 174. **Pledge of Thing which has ceased to exist.**—That which does not actually exist cannot in strictness be the subject-matter of a pledge: as where a thing has ceased to exist, or has not yet come into being. Thus, to take the former case, the pledge contract of goods which prove already burnt up is void: and so is it with the pledge to-day of an animal that died yesterday.² For, though parties might agree to place a heap of ashes, a carcass, or a skeleton, in security, the identity of that to which assent is given must be preserved throughout, and a new product does not answer for the perished thing whose pledge was mutually intended. Where the thing to which the minds of the parties were directed has already been partially, but not utterly, destroyed, the rule might be somewhat different; for here, as our jurists apprehend (though the precise point has not been determined), the pledgee would have his option to decline or accept the security.³ The pledge contract of a particular life-interest in an estate is also, under our general rule, null, if that life has already expired.⁴

§ 175. **Pledge of Thing not yet in Existence.**—The case of a thing not yet come into being presents some difficulty, for equity has much diluted the strength of the common-law rule in this respect. Granting the rule, it yet appears that

¹ *Cleveland v. Shoeman*, 40 Ohio St. 176. See *post*, as to delivery.

To the modern practice of mingling one's wheat or grain with another's so as still to constitute a bailment on the part of the warehouseman, elevator man, etc., we have already referred. *Supra*, § 8. It follows that a warehouseman may effectually pledge a part to secure his own debt by his warehouse receipt; and if the wheat is to be made into flour it may amount rather to a pledge of the flour. *Merchants Bank v. Hibbard*, 48 Mich. 118.

² As to sales under such circumstances, see 2 Kent Com. 468; 2 Schoul. Pers. Prop. § 207; Benj. Sales, bk. 1, pt. 1, c. 4.

³ 2 Kent Com. 468, 469; 2 Schoul. Pers. Prop. § 207.

⁴ See *Strickland v. Turner*, 7 Ex. 208.

the chattel product *in futuro* of that to which one holds a right *in esse*, like the prospective earnings of a voyage, or of some existing contract of service, the year's wool on one's sheep, the milk from one's cows, the severed crops from one's land, a reversionary right as heir, are all deemed assignable interests at this day, and capable of sale; and, if capable of sale, they must be capable of pledge or mortgage.¹ And it is still more broadly asserted that chattels in which one has a potential interest may now be transferred, though not, of course, any mere possibility coupled with neither potential nor actual interest.² Hence one might gain a transferee's interest, not only in the principal thing, but in certain accessions thereto besides. A brickmaker's stipulation that the lessees of a brickyard shall retain the bricks to be made as security for their advances to him has been construed so as to give a pledge of the bricks as fast as they were made, no creditors having attached before the bricks were all taken into the lessees' possession; and although, as it is here maintained, there cannot be a technical pledge of property not in existence, or to be acquired *in futuro*, yet there may be a contract for an hypothecation thereof, so that when the property comes into existence the right of the pledgee will immediately attach to it.³ More recently has additional furniture, which it was similarly agreed should be held as collateral security for the landlord's rent, been protected for the lessor as against subsequent attaching creditors of the

¹ As to sales see Benj. Sales, bk. 1, pt. 1, c. 4; 2 Schoul. Pers. Prop. §§ 207-209; *Bellows v. Wells*, 36 Vt. 599. And as to chattel mortgages see 1 Schoul. Pers. Prop. § 421; *Holroyd v. Marshall*, 10 H. L. Cas. 191; *Harding v. Coburn*, 12 Met. 333. But a chattel mortgage cannot operate upon an ungrown and unsevered crop, for this is real estate. *Comstocks v. Scales*, 7 Wis. 159. And the rule is strictly asserted also against the pledge of an ungrown and unsevered crop. *Gittings v. Nelson*, 86 Ill. 591. But *semble* the pledge would hold good if the creditor severed and held possession before other rights intervened.

² *Ib.*

³ *Macomber v. Parker*, 14 Pick. 497. Cf. *Story Bailm.* § 294 and *n.*

lessee; the understanding being that the pledge of furniture in the hotel should extend to all which the lessee might add from time to time.¹

Our reckoning in these perilous waters may, perhaps, be kept by distinguishing between future obligations, such as a pledge contract might seek to impose upon the parties concerned, and obligations which, to prevail as a pledge or bailment, ought to be in present force; between rights which one may require the other party to recognize when opportunity offers, and yet may not fully enforce to the lawful hindrance of immediate third parties in interest. If a pledge contract undertakes to put in security that which, as a subject-matter, is not actually in existence, there can be no immediate bailment to the pledgee, technically speaking, for there is nothing to deliver him; and non-existence excludes attachment by the pledgor's creditors none the less. We may, perhaps, correctly assume that the pledge contract of after-acquired chattels, or chattels by accession, so far as courts sustain the arrangement, gives the pledgee a right strong as against his pledgor, but which, as against third parties, he must perfect when opportunity offers; so that, if neither actual nor constructive delivery and acceptance follow the accession or production of the new thing, and the owner's creditors meantime attach it, the so-called pledgee fails of security against them.²

§ 176. **Natural Increase as accessory to the Pledge.**—The pledge of a thing carries, by intent, not only the thing itself, but the natural increase thereof, as accessory *in futuro* under the contract. Thus, if a flock of sheep be pledged, the young

¹ *Smithurst v. Edmunds*, 14 N. J. Eq. 408. The ground here taken was that the contract created an equitable mortgage upon the after-acquired property which equity would protect as against subsequently attaching creditors. And see *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548.

² See *Goodenow v. Dunn*, 21 Me. 86; *Jones v. Richardson*, 10 Met. 481; *Helm v. Meyer*, 30 La. Ann. 943; *Collins's Appeal*, 107 Penn. St. 590.

born while the bailment lasts become pledged also;¹ and the pledge of stock or interest-bearing securities likewise attaches to the dividends or interest payments falling due, their natural increment.² For, as soon as the thing comes into existence, the bailee's possession takes effect; though here once more he should, as regards the public, make and keep his possession perfect.

§ 177. **Things whose Pledge is forbidden, etc.**—But there are some things whose pledge is usually forbidden; as, for instance, the pensions, bounties, and pay of soldiers and sailors, a class of persons whom the law seeks to protect, as commonly improvident, and out of easy range of the courts.³ And yet, as to necessities, these can be pledged or pawned at the common law; and it is no uncommon thing for a person in distress to take garments to the pawnbroker which ought to be on his own back.⁴ Nor does the legislative exemption of stated articles from attachment or execution sale forbid their being pledged in such manner as to bind the pledgor.⁵ The Roman policy in respect of pledging necessities was, however, more stringent.⁶ But, in England and America, the law-making power imposes some special checks; as in prohibiting our national banks from loaning or discounting on the security of their own stock, unless it be needful, in order to prevent loss on a debt previously contracted in good faith;⁷ or, again, in

¹ Story Bailm. § 292; 1 Domat, 3, 1, 1, 7-10; Dig. 20, 1, 13; *Smith v. Atkins*, 18 Vt. 461; La Code (1825), art. 3135.

² *Swasey v. North Carolina R.*, 1 Hughes (U. S.), 17. See also *Merrifield v. Baker*, 9 Allen, 29.

³ U. S. Rev. Sts. (1878), § 4745; *McCarthy v. Goold*, 1 B. & B. 389; *Flarty v. Odum*, 3 T. R. 681.

⁴ Story Bailm. § 293.

⁵ *Frost v. Shaw*, 3 Ohio St. 270.

⁶ Story Bailm. § 293; 1 Domat, 3, 1, 1, 24-27.

⁷ *Bank v. Lanier*, 11 Wall. 369. And see *Sankey Brook Coal Co.*, *in re*, L. R. 10 Eq. 381; *Brewster v. Hartley*, 37 Cal. 15.

requiring certain formalities to be pursued.¹ And, while contract rights may now be quite generally pledged, one cannot pledge a cause of action growing out of a personal wrong.²

§ 178. **Second Essential; Debt or Engagement.** — 2. As to the debt or engagement. This may be primary or secondary, on the pledgor's part, absolute or conditional, for the payment of money or for any other lawful performance of an engagement. The pledgor may be bound to the debt or engagement as indorser or surety for another, or as himself the maker or principal.³ So, too, may the security be taken by the pledgee for the repayment of money loaned (which is the usual case) or so as to indemnify him for becoming an indorser or surety at the pledgor's instance.⁴ In every case some lawful debt or engagement which is or may be owing the pledgee constitutes the foundation of the security upon which the thing is given.⁵ A pre-existing debt affords sufficient consideration for a pledge to secure its payment.⁶ The object may be to secure all or part of what one owes, a general or a specific indebtedness;⁷ to protect what is now outstanding from the pledgor, or so as to include future liabilities as they may

¹ Thus, registration is required by the Louisiana statute. And in some States a pledge of stock must be accompanied, according to statute, with a description of the debt in the instrument of transfer; the certificate issued to the pledgee expressing on its face that he holds as collateral security. Mass. Pub. Stats. (1882), c. 105, § 25.

² *Pindell v. Grooms*, 18 B. Monr. 501.

³ *Story Bailm.* § 300; *Brick v. Freehold Co.*, 37 N. J. L. 307; *Stewart v. Davis*, 18 Ind. 74; *Wilcox v. Fairhaven Bank*, 7 Allen, 270.

⁴ The pledgee was a surety to be indemnified, in *Blackwood v. Brown*, 34 Mich. 4; *Gilson v. Martin*, 49 Vt. 474. He was an indorser for the pledgor in *Third Nat. Bank v. Boyd*, 44 Md. 47. And see *Clay v. Creditors*, 9 Mart. 519.

⁵ *Story Bailm.* § 300.

⁶ *Swift v. Tyson*, 16 Pet. 1; *Spencer v. Sloan (Ind.)*, 9 N. E. 150.

⁷ One may give security for the payment of \$10,000 out of his debt of \$17,000; and after he has paid \$10,000 he is entitled to a return and cancellation of the security. *Fridley v. Bowen*, 103 Ill. 633.

arise in favor of the same pledgee;¹ to cover obligations for a fixed or for an indefinite period;² provided always that the transaction be not, as against third parties, a device for defrauding them.

Whatever the security, the pledgee has no right to apply it as another or greater security than what was mutually intended, without the pledgee's free assent. Thus, if B's property is given in pledge for A's note, it does not, without B's knowledge or assent, secure the renewal of A's note at maturity.³ Nor can a banker hold the property of his customer which has been specially deposited with him, so as to operate by way of pledge for transactions which the property was never intended to protect.⁴ Where future advances are to be secured, the character of the property at the time of such advance may be a matter of consequence.⁵ But pledgor and pledgee may agree that a security shall stand for renewals as well as for the original notes secured.⁶

§ 179. **Third Essential; Mutual Assent as to Particular Subject-Matter, Debt, etc.**—3. As to mutual assent that the particular subject-matter be handed over to secure payment or fulfilment of the particular debt or engagement. Mutual assent, whether formally expressed in written or spoken words, or inferable from the acts and conduct of the parties,

¹ *Berry v. Gibbons*, L. R. 8 Ch. 747; *Eichelberger v. Murdock*, 10 Md. 373; *Third Nat. Bank v. Boyd*, 44 Md. 47; *Badlam v. Tucker*, 1 Pick. 389; *Holbrook v. Baker*, 5 Me. 309. But see *Divver v. McLaughlin*, 2 Wend. 596.

² *United States v. Hooe*, 3 Cr. 73; *Stearns v. Marsh*, 4 Denio, 227; *Story Bailm.* § 300.

³ *Burnap v. Potsdam Bank*, 96 N. Y. 125.

⁴ *Duncan v. Brennan*, 83 N. Y. 487; *Biebinger v. Continental Bank*, 99 U. S. 143; *Wyeth v. Market Bank*, 132 Mass. 597; *Woolley v. Louisville Banking Co.*, 81 Ky. 527. No equitable lien arises from the fact that, by mutual agreement, such property originally secured the banker in other dealings since settled. *Ib.*

⁵ *Texas Banking Co. v. Turnley*, 61 Tex. 365.

⁶ *Shrewsbury Institution's Appeal*, 94 Penn. St. 309.

presupposes a contract which parties enter into conformably to the law of contracts. This contract should be between parties legally competent thereto; neither disqualified, as are insane persons, and, to a certain extent, infants and married women;¹ nor, like certain kinds of corporations, placed under special statute disabilities in this respect.² It must not be made under circumstances involving force or fraud; for this would render it voidable by the injured party.³ Nor, with reference to the pledgor's other creditors and third parties generally, ought such agreements to be fraudulent; else the party wronged might have the transaction set aside.⁴ Whether mutual assent has closed, or there is, instead of a pledge contract, a mere unaccepted offer to pledge, the law of contracts will determine.⁵

§ 180. **The same Subject; Illegal Pledge Contracts.**— Illegality of the pledge contract is another cause of avoidance; rendering it, indeed, utterly null in purview of the law. But since, apart from regarding each culprit's own criminal accountability, the fact that illegality practically puts out of court the party who seeks to enforce the contract tainted with it, one's disadvantage might, to his opponent, prove a positive advantage. For instance, a creditor who supplies victuals for debauch in a brothel cannot sue to recover payment;⁶ nor (in some States) an usurious lender;⁷ nor, as a rule, one whose demand shows him to be a Sunday-law breaker.⁸ Consequently the promise of a pledge to secure

¹ See, as to the pledge capacity of married women, *Leitch v. Wells*, 48 N. Y. 585; *Rowland v. Plummer*, 50 Ala. 182.

² *Bank v. Lanier*, 11 Wall. 369; *Sankey Brook Coal Co., in re*, L. R. 10 Eq. 381. But see *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 548; *Curtis v. Leavitt*, 15 N. Y. 9, to the point that a statute prohibition may yet leave rights as pledgee *sub modo*.

³ Story Bailm. § 302.

⁴ *Ib.*

⁵ See *Providence Thread Co. v. Aldrich*, 12 R. I. 77.

⁶ *Taylor v. Chester*, L. R. 4 Q. B. 309.

⁷ *Causey v. Yeates*, 8 Humph. 605; 1 Schoul. Pers. Prop. §§ 265-290.

⁸ *King v. Green*, 6 Allen, 139.

any such debt is null, as well as the debt itself; and so far the pledgor and debtor is the better off. But, once having executed the contract by delivery, the pledgor gives his pledgee the advantage; so that, being now compelled to show, if he would get the thing back, that he gave it to secure an illegal contract in which he participated, he cannot recover it, without first paying or tendering what he owes so as to stand upon his general rights as owner; and though the pledgee meantime may be unable to sue for the illegal debt, he can yet retain possession of the pledge, for the maxim is, *in pari delicto potior est conditio possidentis*.¹

§ 181. **The same Subject; where Pledgor is not Owner.** — It is not essential to the validity of the pledge contract that the thing pledged should belong to the pledgor himself. As between the parties themselves and against the general public, that transaction may be upheld which some third person with better title might successfully impugn. Clearly an authorized agent may make a pledge contract on behalf of his principal; an officer, in the name of the corporation he represents; and a holder, generally, under an owner's consent.² Nor can any pledgor assert his own wrongful delivery of another's property as a ground for recovering it from the pledgee without first discharging his pledge obligation.³ All this accords with the general law of bailments elsewhere discussed.⁴

But the rightful owner, if not himself at fault, as in giving his agent too great a show of authority, or pursuing his remedies too tardily, may overtake and recover his chattels put or promised in pledge, were the pledgee never so honest on his part. For as to corporeal chattels more particularly, the old rule avails that property cannot at the common law be pledged

¹ Cases *supra*; *Curtis v. Leavitt*, 16 N. Y. 9. And see *supra*, § 92.

² *Jarvis v. Rogers*, 13 Mass. 105; *Story Bailm.* § 291.

³ *Story Bailm.* § 291; *Goldstein v. Hort*, 30 Cal. 372.

⁴ See *supra*, §§ 19, 22.

as against the true owner without his assent.¹ Money, bank-notes, and current negotiable securities not overdue stand, however, on such a peculiar footing at the common law with regard to facility of transfer that the *bona fide* pledgee can hold such a thing to the extent of his just demand as against even a rightful owner from whom the pledgor had stolen it;² though, with respect to stock, the case is not so clear.³ But, at all events, the pledgee, even on such a vantage ground, should not appear to have closed his eyes to signs of his pledgor's dishonesty. Stock is differently treated by the custom and legislation of different States; but by the safer rule the offer of stock to secure one's private debt, whose certificate is simply expressed in the name of "A. B., Trustee," puts the intended pledgee on inquiry as to the character and limitations of the trust, and if he accepts the pledge without inquiry, he does so at his peril.⁴ Negotiable securities may also run with like restriction.⁵ Nor can overdue paper or negotiable securities with suspicious erasures be safely taken in pledge;⁶ nor stock issued under a forged order of transfer;⁷ nor, as it appears, negotiable instruments which, though genuine, have never been put into circulation;⁸ nor public securities which have been paid, and instead of being

¹ As where a thief or the bailee for hire pledges wrongfully. *Small v. Robinson*, 69 Me. 425; *Singer Man. Co. v. Clark*, 5 Ex. D. 37; *Gottlieb v. Hartman*, 3 Col. 53; *Branson v. Heckler*, 22 Kan. 610.

² 2 Schoul. Pers. Prop. §§ 20, 21; *Raphiael v. Bank of England*, 17 C. B. 161; *Goodman v. Simonds*, 20 How. 343; *Fisher v. Fisher*, 98 Mass. 303; 4 Mo. App. 59; *Bealle v. Southern Bank*, 57 Ga. 274; *Farwell v. Importers Bank*, 90 N. Y. 483.

³ Cf. *Sewall v. Boston Water Power Co.*, 4 Allen, 272, 282; *Burton's Appeal*, 93 Penn. St. 214.

⁴ *Walker v. Taylor*, 4 L. T. N. S. 845; *Shaw v. Spencer*, 100 Mass. 382. But see *Thompson v. Toland*, 48 Cal. 99, *contra*.

⁵ *Treultet v. Barandon*, 8 Taunt. 100; *Story Bailm.* § 323.

⁶ *Vermilye v. Adams Express Co.*, 21 Wall. 138; *Colson v. Arnot*, 57 N. Y. 253.

⁷ *Ib.*; *Hambleton v. Central Ohio R.*, 44 Md. 551.

⁸ *Francia v. Joseph*, 3 Edw. Ch. 182.

cancelled, are improperly reissued.¹ There is furthermore a distinction to be observed between the *bona fide* holder for value before and after maturity of the negotiable instrument which is transferred without right or title; for after maturity, title depends upon true ownership as in non-negotiable chattels.²

§ 182. **The same Subject.**—In general, as between two innocent parties, one of whom must lose, the rule is, that he shall suffer who enabled the wrong to be committed; a maxim not always found easy of application in the present instance, and yet often available on behalf of the *bona fide* pledgee against a true owner.³ This principle we shall presently pursue in connection with a pledgee's sub-pledge or overdealing with the property intrusted to his keeping. We may observe, however, a constant tendency in the later cases to favor every *bona fide* holder of a thing to the extent of his advances upon its security, not only where the doctrine of negotiable paper may be invoked on his behalf, but whenever it may be said that the true owner trusted the property or the *indicia* of title to another's hands so carelessly that, even though an agency for the pledge was not strictly conferred, the owner enabled the wrong of inducing a loan upon its security to be committed.⁴

¹ Board of Education *v.* Sinton, 41 Ohio St. 504.

² See this distinction pursued in Texas Banking Co. *v.* Turnley, 61 Tex. 365, following 6 Wall. 493; 7 Wall. 435.

³ Calais Steamboat Co. *v.* Van Pelt, 2 Black, 372; Babcock *v.* Lawson, 4 Q. B. D. 394.

⁴ Thus, in States where certificates of stock with a blank transfer or an irrevocable power of attorney to transfer pass freely from one owner to another, the inclination is to regard one who loans in good faith upon its security as superior in equity to the true owner of stock, if such owner gave it to one who abused his opportunities as the owner's agent or trustee. Cherry *v.* Frost, 7 Lea, 1; Merchants Bank *v.* Livingston, 74 N. Y. 223; Burton's Appeal, 93 Penn. St. 214. But not where the person who pledged claimed to be a mere agent. Merchants Bank *v.* Livingston, *supra*. It does not follow that stock is to be treated like negotiable paper; but it seems rather an extension of an agent's authority by the apparent scope of the powers conferred upon him, or an apparent ownership. See

§ 183. **Power of Executors, Guardians, etc., to pledge.** — Executors, guardians, and other fiduciary officers are permitted so wide a range of authority in the ordinary exercise of their trusts, that one need not question their general power to pledge personal assets of the trust fund.¹ But it is otherwise where the party dealing with such an officer is chargeable with notice of his breach of trust; as if, for instance, the latter should undertake to place in security, for his private advantage, chattels which manifestly belonged to the estate.² Where, however, the intended pledgee, when put upon inquiry, receives false information, but such as might fairly lull his suspicions, and accepts the pledge accordingly, the courts incline to protect his interest as *bona fide*, and prudently acquired.³ Akin to this doctrine is that which fits agents having large general powers for managing the principal's personal estate.⁴

§ 184. **Pledge by Factor, Broker, etc.** — But as to factors, brokers, and commission merchants, the strict common law discountenanced their pledging, though they might sell under a bill of lading;⁵ and hence a factor could not pledge his

also *Hakes v. Myrick* (Io.), 28 N. W. 574, where a mortgage and note were pledged with mortgagee's consent, though not strictly as authorized; *Honold v. Meyer*, 36 La. Ann. 585; *Stone v. Brown*, 54 Tex. 330, where land scrip was deposited with an agent having complete transfers executed in blank.

¹ *Earl Vane v. Rigden*, L. R. 5 Ch. 663; *Berry v. Gibbons*, L. R. 8 Ch. 747; *Ashton v. Atlantic Bank*, 3 Allen, 217; *Rhone v. Lewis*, 13 Rich. Eq. 269; *Field v. Schieffelin*, 7 Johns. Ch. 150; *Petrie v. Clark*, 11 S. & R. 377.

² *Shaw v. Spencer*, 100 Mass. 382; *Thompson v. Toland*, 48 Cal. 99.

³ See *Field v. Schieffelin*, *supra*; *Buttrick v. Holden*, 13 Met. 355. In *Berry v. Gibbons*, L. R. 8 Ch. 747, it was held that a banker dealing with an executrix and receiving assets in pledge, is not bound to take notice of *lis pendens*, while the executrix has not been enjoined from managing the property.

⁴ 2 Kent Com. 625-628; *Davidson v. Bodley*, 27 La. Ann. 149.

⁵ *M'Combie v. Davies*, 7 East, 5; Story Agency, § 113; Story Bailm. §§ 296, 325, 326; *First Nat. Bank v. Nelson*, 38 Ga. 391; *Warner v.*

principal's goods as security for his own debt, whether by indorsing and delivering the bill of lading, or by delivering the goods.¹ If he did so, the principal might treat the transaction as altogether tortious, and recover the goods from the pledgee, regardless of the latter's ignorance or honest intent; unless, indeed, he had held out his factor as specially authorized in the premises.² The hardship of this rule, as Judge Story has stated, is to deny to the pledgee any right to retain the goods, even for the factor's own balance against his principal.³ And yet, as to negotiable paper, unless the pledgee can be charged with notice of the fraud or the agent's want of authority, the pledge shall bind the principal, though the agent used it as collateral security for his private debt.⁴ The English Factors' Acts, too, mitigate the rigor of the common law by sanctioning the pledge of goods by such agents to the extent of *bona fide* advances upon them;⁵ not, however, to the extent of countenancing a pledge for securing some antecedent debt due from factor to pledgee; nor so as to benefit an agent wrongfully retaining goods, whose authority has been revoked.⁶

The tendency of legislation in this country is likewise towards enlarging the rights of the *bona fide* pledgee of any person who has possession of merchandise, or a bill of lading, with power to sell.⁷ Indeed, aside from legislation, and upon

Martin, 11 How. 209; Holton v. Smith, 7 N. H. 446; Newbold v. Wright, 4 Rawle, 195; Bott v. McCoy, 20 Ala. 578; Insurance Co. v. Kiger, 13 Otto, 355.

¹ *Ib.*

² Wayne, J., in Warner v. Martin, 11 How. 209, 224.

³ Story Bailm. §§ 325, 326.

⁴ Collins v. Martin, 1 B. & P. 648; 2 Kent Com. 626.

⁵ Acts 4 Geo. IV., c. 94, & 5 & 6 Vict. c. 39; Alston, *ex parte*, L. R. 4 Ch. 168; Portalis v. Tetley, L. R. 5 Eq. 140.

⁶ Fuentes v. Montis, L. R. 3 C. P. 268; s. c. L. R. 4 C. P. 93; Macnee v. Gorst, L. R. 4 Eq. 315.

⁷ Mass. Gen. Sts. (1860), c. 54, § 4; Cartwright v. Wilmerding, 24 N. Y. 521; Henry v. Phil. Warehouse Co., 81 Penn. St. 76. See Mer-

the principles of agency and sub-pledge considered in this chapter, the equity of the person who has *bona fide* advanced money and received the goods in pledge has been of late protected.¹

While, we may add, the common-law prohibition of the factor's pledge is thus strict, he is permitted to deliver his principal's goods to a third person, with notice of his lien, and, as his agent, to keep possession for him; since this amounts simply to a continuance of the factor's possession, and affords the means of protecting his lien, and no more.² An auctioneer, too, receiving from a factor, empowered to sell, a consignment of goods, may make part-payment of the proceeds by way of advance to the factor.³

§ 185. **Power of Life Owner, etc., to pledge.**—One who has a limited title to a chattel, or a special interest therein, such as a life owner, or a lien-creditor, is allowed to pledge to the extent of his title, though not beyond it.⁴ And it is held that the pledge of collaterals by one who holds them from another party is not *per se* a conversion as against that party; for, if he is prepared to restore them at the proper time, the original pledgor has no cause of complaint.⁵

§ 186. **Whether Corporation or Partnership may pledge.**—A corporation, or a partnership firm, may make a pledge.⁶ But

chants Nat. Bank v. Trenholm, 12 Heisk. 520; Cleveland v. Shoeman, 40 Ohio St. 176.

¹ See First Nat. Bank v. Boyce, 78 Ky. 42, where this subject is fully discussed; *supra*, § 182; *post*, § 218.

² 2 Kent Com. 626, 627; Story Bailm. § 325; M'Combie v. Davies, 7 East, 5.

³ Laussatt v. Lippincott, 6 S. & R. 386.

⁴ Story Bailm. § 295; Hoare v. Parker, 2 T. R. 376; Hooper v. Ramsbottom, 4 Camp. 121.

⁵ Shelton v. French, 33 Conn. 489.

⁶ City Bank of Racine v. Babcock, 1 Holmes (U. S. Cir.), 180; Faulkner v. Hill, 104 Mass. 188. But a corporation cannot issue stock to a corporation creditor as a pledge to secure its own indebtedness. Brewster v. Hartley, 37 Cal. 15.

here the limits of corporate or partnership authority should be noted. One partner cannot, for instance, pledge the partnership stock-in-trade in payment of his individual debts, without the consent of his copartners, whether the creditor knew it to be partnership property or not; but the pledgee's right must depend on the assent of the other partners.¹ But in accounting under a bill of equity, credit may be allowed a pledgee for advances that were actually paid for partnership purposes.²

§ 187. **What Security the Pledge is given for.** — In all cases of pledge contract, the pledge is understood to be a security for the whole, and for every part of the debt or engagement, unless it has been otherwise stipulated between the parties; so that the payment or discharge of a part would leave it a perfect pledge for the residue of the debt or engagement. But mutual intention should control, as in the interpretation of other contracts. Hence a security taken for a specific purpose must be applied to that precise purpose alone, unless the parties modify the arrangement, as of course they may.³ And where a loan is made a party on one pledge, and a later distinct loan is made the same party upon another pledge, the presumption arises that each transaction was intended to stand by itself.⁴ A number of securities may be taken for the same debt, and a pledge may go with a mortgage, or some third person's engagement;⁵ the creditor, in such case, having his election as to enforcing any or all upon default, but with the right of only one possible satisfaction.⁶

¹ *Liberty Bank v. Campbell*, 75 Va. 534; *Rogers v. Batchelor*, 12 Pet. 221.

² *Liberty Bank v. Campbell*, *supra*. As to pledging a limited partner's own interest, see *Collins's Appeal*, 107 Penn. St. 590.

³ *Phillips v. Thompson*, 2 Johns. Ch. 418; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *Eichelberger v. Murdock*, 10 Md. 373; *Post v. Tradesmen's Bank*, 28 Conn. 420; *supra*, § 178.

⁴ *Baldwin v. Bradley*, 69 Ill. 32.

⁵ *Union Bank v. Laird*, 2 Wheat. 390, per Mr. Justice Story; *Cullum v. Emanuel*, 1 Ala. 23; *Buchanan v. International Bank*, 78 Ill. 500; *Andrews v. Scotton*, 2 Bland, 629.

⁶ *Ib.*

§ 188. **Delivery in Pledge; Effect of Contract without Delivery.**—II. Delivery in pledge. Until an actual transfer of possession has taken place, there is, to speak with precision, no pledge, no bailment; but, instead, an executory pledge contract upon sufficient consideration, which each may hold the other bound to perform. Damages for non-performance will be awarded the aggrieved party who sues as for breach of the contract; or perhaps equity would decree a specific performance. The latter remedy, however, is not available on an intended pledgee's behalf, to the prejudice of rights *in rem*, which may have intervened, like those of attaching or execution creditors of the intended pledgor; nor, as against his general creditors, where he meantime dies insolvent, or has been forced into bankruptcy.¹ For, under a pledge contract, there is no transfer of an owner's title, as in the case of sale or mortgage, but the essence of the pledgee's preference consists in a transfer of possession, or what we term delivery.² In general, to create a pledge, the pledgee should have the possession and actual control of the property.³

Writings may pass in a pledge contract, but the pledge transaction is commonly oral, and in fact it involves a bailment of the thing.

§ 189. **What constitutes Delivery; Actual or Constructive.**—Delivery, in order to be effectual, should be followed by an acceptance of possession; and methods of delivery and acceptance differ, according to the subject-matter and the local situation of the thing. But constructive delivery and acceptance are now much favored in such transactions. The transfer of the bill of lading of a ship at sea, or the delivery

¹ Story Bailm. § 297; City Fire Ins. Co. v. Olmsted, 33 Conn. 476. And see First Nat. Bank v. Nelson, 38 Ga. 391; Beeman v. Lawton, 37 Me. 543.

² Whether a certain writing evinces a pledge or a mere offer to pledge, see Providence Thread Co. v. Aldrich, 12 R. I. 77.

³ Corbett v. Underwood, 83 Ill. 324.

of a warehouse key, have long been esteemed sufficient for legally transferring possession of the thing so symbolized.¹ And so, in modern times, one's pledge by delivering bills of lading of goods on transit, or way bills whether inland or by water, usually suffices to make the pledgee's title good against the world.² Warehouse receipts, and the receipts of wharfingers, or other hired custodians, are also, when expressed in a negotiable form, permitted, in a variety of instances, to be turned over by way of a symbolical delivery of the goods on storage which they represent.³ Even the delivery of such muniments without a formal indorsement or assignment has, in deference to mutual intent and the loose usages of business, been frequently upheld as constructively sufficient.⁴

§ 190. **Delivery, as to Bills of Lading, Warehouse Receipts, etc.** — Advances are constantly made on the security of merchandise in the course of trade at the present day; and it is quite customary of late years for the consignee of goods which are on transit to pass his bills of lading over to some bank or capitalist by way of security for the discount of his paper. Such transfers are firmly sustained by American courts as amounting to a pledge of the goods themselves for the pledgor's paper indebtedness, and, whether the transit were by land or sea, valid, on the score of a constructive delivery as against both the pledgee and the public.⁵ The exercise of further dominion over the goods by such a pledgor, without

¹ *Atkinson v. Maling*, 2 T. R. 462; *Barber v. Meyerstein*, L. R. 4 H. L. 317; *Story Bailm.* § 297; *Shaw, C. J.*, in *Sumner v. Hamlet*, 12 Pick. 76; *Whitney v. Tibbits*, 17 Wis. 359; 2 Kent Com. 580.

² *Dows v. Nat. Exchange Bank*, 91 U. S. 618; *Petitt v. First Nat. Bank*, 4 Bush, 334; *First Nat. Bank v. Kelly*, 57 N. Y. 34. See § 190.

³ *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661, 676; *Cartwright v. Wilmerding*, 24 N. Y. 521. And see *Taylor v. Turner*, 87 Ill. 296, as to "railroad receipts" or way bills.

⁴ *Whitney v. Tibbits*, 17 Wis. 359.

⁵ *Dows v. Nat. Exchange Bank*, 91 U. S. 618; *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Petitt v. First Nat. Bank*, 4 Bush, 334; *Hathaway v. Haynes*, 124 Mass. 311.

his pledgee's assent, is held to confer upon a third party only a tortious possession, such as cannot prevent the pledgee from recovering them.¹

A symbolical or constructive delivery in pledge ought to be followed by acts on the pledgee's part evincing the intention of pursuing his opportunities to make the corporeal transfer complete; for a symbolized transfer stands for something whose possession may be made more conclusive. But the landing of goods at a wharf, subject to a stop-order, is held no such completion of the transit as would impair the efficacy of a bill of lading as their representative.² And, though the bill of lading at issue be only one of duplicates or triplicates, the person who first gets it while the carriage obligation remains unfulfilled will take rank as transferee of the goods over all who may claim under other instruments of the same set.³

Here we may observe, that while the bill of lading entitles the holder to the property described therein, the pledgee encounters certain risks. For instance, if these bills of lading are given in duplicate or triplicate, a *bona fide* delivery of the goods by the carrier to the person holding the second bill may exclude the pledgee who holds the first bill for security if his claim was not earlier known.⁴ Nor has a bill of lading the full character of a negotiable instrument even though passing by indorsement and delivery; for its receipt or description of goods is *prima facie* only, and does not warrant that the goods are in all respects what the document purports.⁵

¹ *Marine Bank v. Fiske*, 71 N. Y. 353.

² *Barber v. Meyerstein*, L. R. 4 H. L. 317.

³ *Ib.* And see *Meyerstein v. Barber*, L. R. 2 C. P. 38, 661; *Young v. Lambert*, L. R. 3 P. C. 142.

⁴ *Glyn v. East India Dock Co.*, 7 App. Cas. 59; distinguishing *Barber v. Meyerstein*, *supra*.

⁵ *Shaw v. Merchants' Bank*, 101 U. S. 557. Even though a local statute should make such instruments "negotiable," it does not follow that all the advantages incident to advancing *bona fide* on a negotiable instrument must follow. See *post*, §§ 461, 462.

Neither a carrier nor a warehouseman is to be converted into a guarantor of property and its title for the convenience of customers who employ him ; his position differing greatly from that of the party who gives his bond or note for the payment of a definite sum of money.

§ 191. **Where Pledgee is already in Possession.**—If the chattels for pledge be already in the pledgee's possession, for some other purpose, no formal change of possession is needful, since the pledge contract can operate as a constructive transfer.¹ And, where A and B are in joint possession, the pledge to either of them is good, if both have knowledge and give assent that the property shall be held thenceforth for the pledgee alone.²

§ 192. **Delivery by Means of Agents.**—Delivery may be through the medium of agents, as well as by their principals in person ; as, under the English Factors' Acts, by a factor or commission merchant ; or, to speak more generally, by any party whom the pledgor has held out as having due authority to accomplish the transfer on his behalf. And, as against the principal pledgor himself, it is held sufficient that his agent has been intrusted with the primary document of transfer, according to the course of business, and that the pledgee acts upon faith of such document.³ Goods in a warehouse, subject to be withdrawn by one's agent at pleasure on payment of the duties, are sufficiently in his possession to justify his pledge thereof, so as to bind his principal, the owner of the goods.⁴ Such negotiable instruments as pass on delivery to *bona fide* parties for value may even be pledged wrongfully, and yet so as to confer upon the honest pledgee a good security title.⁵ Agency, express or implied, confers authority ; and in

¹ Story Bailm. § 297 ; *supra*, § 3.

² *Brown v. Warren*, 43 N. H. 430 ; *Parsons v. Overmire*, 22 Ill. 58.

³ *Cartwright v. Wilmerding*, 24 N. Y. 521.

⁴ *Ib.*

⁵ *Goodwin v. Roberts*, 1 App. Cas. 476 ; 4 Mo. App. 59 ; *supra*, § 182, and cases cited.

any case it is sufficient that the owner consented to have the thing pledged.

Again, as to agency on a pledgee's behalf, delivery may be to some third person for delivery over to the creditor.¹ And there may be a binding acceptance by the pledgee's agent, acting for him; for, where property has been pledged as security, it is quite immaterial whether the pledgee holds it in person or some third person holds it for him.²

An agent of the pledgor, too, holding the thing in his temporary possession, such as a warehouseman, safe depositary, or hired workman, may, without any local removal of the thing, attorn over, and, as the pledgee's custodian, hold it against all the world;³ and this, even though the agent is to do some additional work on the thing pledged, which the pledgor is expected to pay for.⁴

§ 193. **Whether Pledgor may hold as Pledgee's Agent.**—What complicates pledge delivery still further is the doctrine, now well incorporated in our jurisprudence, that the agent to take and keep legal possession for the pledgee may be no other than the pledgor himself.⁵ But, as the law declares, a pledgor's possession on his pledgee's behalf should not be a mere device for the purpose of defrauding his other creditors; nor, as we may conjecture, ought the transaction to indicate that one, a pledgee by right, has simply delayed or abandoned his opportunities of accomplishing a transfer to his own possession. And, whether the pledgor's agency for his pledgee can be set up in every instance to disconcert *bona fide* attaching creditors or purchasers with claims *in rem*, we may still question; for to permit this doctrine of a

¹ Boynton v. Payrow, 67 Me. 587.

² Brown v. Warren, 43 N. H. 430.

³ Sumner v. Hamlet, 12 Pick. 76.

⁴ *Ib.*

⁵ Martin v. Reid, 11 C. B. N. S. 730; Rawson, *in re*, 2 Lowell, 519; Parshall v. Eggert, 54 N. Y. 18; Cooper v. Ray, 47 Ill. 53. But see First Nat. Bank v. Nelson, 38 Ga. 391; Geddes v. Bennett, 6 La. Ann. 516.

pledgor's agency to operate, except as between the parties themselves, and, perhaps, the general public, is practically to dispense with delivery altogether, and nullify the fundamental rule of bailment.¹

To this subject we shall presently recur when discussing the pledgee's duty of keeping the possession once given him. But here we may add that the dangerous doctrine of a pledgor's holding as pledgee's agent is checked in some of the latest cases; which still maintain that possession by the pledgee is of the very essence of a pledge, and that where the pledgee never had possession there is, as to third persons like *bona fide* transferees or attaching creditors of the pledgor, no lien or security, more than under a mere contract for a pledge.²

§ 194. **Element of Notice to Another considered.**—Where an agent of the pledgor holds the thing which is pledged by the transfer of symbol or muniment of title, some notice to this custodian may be needful, in order that he may attorn over, and so give the pledgee's claim a clear operation. So, too, is the transfer of certain kinds of property attended with peculiar solemnities not unlike in character. Indeed, what we may call notice to the fundholder, custodian, or indebted party is often an important element in completing the security of a pledgee. Stock in a chartered company, for instance, may pass, for some purposes, by a delivery of the scrip or certificate; but, in order to make a complete transfer of the shares, there should be, besides, some indorsement or other writing, authorizing a transfer on the company's books, so that, upon presentation of the old scrip and authority of transfer at its office, the company may issue a new certificate or scrip in the name of the transferee. Such formalities enable the company to keep a correct register of its stockholders and to properly conduct its routine transactions. Now the new certificate or

¹ *Ib.*

² *Casey v. Cavaroc*, 96 U. S. 467; *Thompson v. Dolliver*, 132 Mass. 103; 18 Hun, 187.

the corporate records might set forth such transferee as absolute owner of the stock; and yet the transaction could be proved a pledge and enforced between the parties accordingly.¹ It is more natural, however, for the new certificate to express on its face that the pledgee holds it as collateral security only; and unless this be done, and the instrument of transfer describe the debt, the pledgee will in some States be held to a shareholder's liabilities in his pledgor's stead.²

What is the legal effect, pending notice and a formal transfer on the books, of a mere delivery of scrip or the pledgor's certificate, with perhaps an authority of pledge transfer, would depend upon circumstances. It should operate as a pledge between the parties themselves in any event;³ it might perhaps prevail at once against third parties where steps were promptly taken on the pledgor's behalf to complete the transfer formalities, and only distance or the company's laches caused delay; but where the pledgee defers such completion, and the stock is meantime attached at the company's office as the pledgor's absolute property, the attaching creditor takes priority.⁴ But in some States a certificate of stock, with blank indorsement, assignment, or power of attorney, affords substantially the full *indicia* of pledge title.⁵

§ 195. **The same Subject.** — Notice to the company is an element of corresponding importance in the delivery of some other incorporeal kinds of chattels; the assignment of an insurance policy, for instance,⁶ or of a savings-bank book;

¹ *Newton v. Fay*, 10 Allen, 505; *Wilson v. Little*, 2 Comst. 443; *Gilpin v. Howell*, 5 Penn. St. 41; *Pinkerton v. Railroad*, 42 N. H. 424; *Brick v. Brick*, 98 U. S. 514.

² Mass. Gen. Stats., c. 68, § 13; *Newton v. Fay*, 10 Allen, 505.

³ *Blouin v. Hart*, 30 La. Ann. 714.

⁴ *Pinkerton v. Railroad*, 42 N. H. 424.

⁵ *Cherry v. Frost*, 7 Lea, 1; *supra*, § 182; 31 La. Ann. 149.

⁶ *Bruce v. Garden*, L. R. 5 Ch. 32; *Edwards v. Martin*, L. R. 1 Eq. 121.

for the rules of such companies usually require these formalities. So, too, if bills of lading are issued in duplicate or triplicate, it is a wise precaution for the pledgee to notify the carrier of his claim before the other bill is presented;¹ and for warehouse receipts and all other documents which symbolize goods not yet in the pledgee's possession, this offers a safeguard against fraud.² The law of assignments regards in general this element of notice to the indebted party. In short, this seasonable notice to fundholder, custodian, or debtor may be of much importance in completing a delivery and retention of possession as against third parties under the circumstances of a given case; though less so, certainly, as between the pledge parties themselves.³

§ 196. **Other Formalities, of Registry, etc.** — Local statutes, too, sometimes interpose to require that, as against the public and more particularly lien-creditors of the pledgor, certain symbolical instruments of transfer, like bills of sale, which are designed to operate as pledge, shall be registered, or else that notarial formalities shall attend the transfer,⁴ unless at all events the pledgee gains full possession before conflicting liens attach.⁵ And yet it is more commonly a result of the cardinal distinction between pledge and chattel mortgage, that the latter sort require registration, while the former neither require nor admit of it;⁶ nor should statute notice to the

¹ *Glyn v. East India Dock Co.*, 7 App. Cas. 475.

² Duplicate receipts, etc., are sometimes cunningly procured, and the pledgee who fails to give notice may encounter a superior equity. *People's Bank v. Gayley*, 92 Penn. St. 518.

³ Bank stock cannot be pledged by merely delivering the certificates to the pledgee; there must be a transfer on the books or some written contract, at least, by which the pledgee may assert title or compel a transfer. *Nisbet v. Macon Bank*, 4 Woods, C. C. 464.

⁴ *Hubert v. Creditors*, 1 La. Ann. 442; *Martin v. Creditors*, 15 La. Ann. 165.

⁵ *Helm v. Meyer*, 30 La. Ann. 943.

⁶ *First Nat. Bank v. Kelly*, 57 N. Y. 34; *Parshall v. Eggert*, 54 N. Y. 18; *Rawson, in re*, 2 Lowell, 519; *Thoms v. Southard*, 2 Dana, 475;

world be held indispensable as between the pledge parties themselves.¹ As against third persons, too, the pledge would usually be effective, notwithstanding non-compliance with the formalities thus prescribed, provided the object of pledge came into the pledgee's actual possession before any adverse lien had attached.²

§ 197. **Indorsement, Assignment, etc., in Delivery.** — A negotiable instrument should, when its pledge is intended, be delivered into the pledgee's possession, with or without indorsement, according to its tenor;³ though whether, as between the parties, an omission to indorse would, under these circumstances, invalidate the pledge, is very doubtful; and in fact it has been treated like the assignment of a non-negotiable chose.⁴ The assignment of any written contract, even if absolute in form, will be a sufficient delivery in pledge of the rights thereunder, provided such be the mutual understanding of the parties.⁵ The delivery of a savings-bank book as security for a debt will create a valid pledge of the book and deposit;⁶ and though, as we have intimated, formal assignment and notice to the company is desirable, yet the mere delivery of the book without a written assignment has been pronounced sufficient, not only as between the pledge parties themselves, but even in certain instances as against an attaching creditor of the pledgor.⁷ So, too, in the transfer of

1 Schoul. Pers. Prop. § 425; *Shaw v. Wilshire*, 65 Me. 485; *Doak v. Bank of State*, 6 Ire. L. 309; 3 Tenn. Ch. 13.

¹ *Matthews v. Rutherford*, 7 La. Ann. 225.

² *Helm v. Meyer*, 30 La. Ann. 943. Under La. Code, art. 3158, a contract of pledge of movable property other than notes, bills, and stocks, must be in writing to affect third parties. 32 La. Ann. 586.

³ *Fluker v. Bullard*, 2 La. Ann. 338; *White v. Platt*, 5 Denio, 269.

⁴ See *Dunn v. Meserve*, 58 N. H. 429.

⁵ *Gay v. Moss*, 34 Cal. 125.

⁶ *Boynton v. Payrow*, 67 Me. 587; *Taft v. Bowker*, 132 Mass. 277.

⁷ *Taft v. Bowker*, 132 Mass. 277, where the bank was served in trustee process. For, as the court observed, delivery of the book with the

a bill of lading the indorsement formalities are not strictly regarded.¹

§ 198. **Miscellaneous Points in Delivery.**— Under suitable circumstances, that delivery and acceptance which satisfies the law may concur where there is rather a permissive taking than any active transfer of possession; where, for instance, a creditor, with the owner's leave, assumes the custody of chattels for his pledge security, and continues to hold them. Even as against third parties, a pledgor's want of opportunity to make as full and complete a transfer of possession as the thing admitted of, has, where he himself offers no obstruction to the pledgee's claim, been construed in favor of the latter.²

But since mutual assent is essential to pledge contracts, one cannot make a general conveyance in trust for the benefit of his creditors, which shall take effect as a pledge independently of their action in the premises.³

§ 199. **General Conclusions as to Delivery in Pledge.**— Two leading conclusions may be drawn from the precedents which form the modern mosaic of pledge delivery. 1. That in the growing complexity of commercial and mercantile transactions, with so many new classes of incorporeal rights coming into the list of things personal, the disposition increases to apply to all chattel transfers the test of mutual intent on equitable considerations; so that the English and American courts, while abating little of the common-law theory that a change of possession must attend every pledge transaction, have come to swerve very far from it in practice. 2. That, with the present laxity of construction, pledge delivery seems to comport itself differently under these three leading aspects;

intention of giving collateral security amounted to an equitable assignment of the deposit.

¹ *Holmes v. Bailey*, 92 Penn. St. 57.

² *Parsons v. Overmire*, 22 Ill. 58.

³ *Stevens v. Bell*, 6 Mass. 339.

(*a*) as between the pledge parties themselves, (*b*) as between the pledge parties and the pledgor's general creditors, and (*c*) as between pledge parties and those like a pledgor's attaching creditors or purchasers, or new parties lending on security of the thing, who acquire intervening rights *in rem* without notice. As between the parties themselves, their executory contract so upholds the transaction, while manual delivery continues incomplete, that the pledge security holds by construction, though accompanied by no actual change of possession.¹ As between the pledge parties and general creditors, such transactions can only be attacked by the latter for fraud upon them; and if there be a *bona fide* pledge contract, ineffectual for want of delivery, the pledgee may, at any time, take full possession, and maintain his priority over them.² But, as to those acquiring intervening rights *in rem*, without notice of the pledge, the pledgee who has not taken full possession generally fails to gain precedence; though to this might sometimes be opposed the suggestion that the pledgor continues in possession as his pledgee's *bona fide* agent;³ or, possibly, that the delay in completing certain formalities of delivery had occurred without fault on the pledgee's part,⁴ or that such formalities were under the peculiar aspect of the case needless.⁵ Moreover, as we have seen, (*d*) the element of notice to stakeholder, custodian, or debtor, is in many transactions a vital one; and the pledgee's rights as concerns such a party require consideration.

¹ *Martin v. Reid*, 11 C. B. N. S. 730; *Keiser v. Topping*, 72 Ill. 226; *Tuttle v. Robinson*, 78 Ill. 332.

² *Parshall v. Eggert*, 54 N. Y. 18. See *Succession of Hiligsberg*, 1 La. Ann. 310.

³ *Rawson, in re*, 2 Lowell, 519; *supra*, § 193.

⁴ *Pinkerton v. Railroad*, 42 N. H. 424.

⁵ See *Taft v. Bowker*, 132 Mass. 277. *Quære*, whether as among third parties with intervening rights, *in rem*, one who buys or advances does not stand on a stronger footing than a mere attaching creditor of the pledgor. The cases are not yet clear on this point.

In general, we may add, the position of a pledgee is far less favorable for maintaining his cause where he is out of full personal control, and must take the offensive, than where he has such control and has only to defend. Our modern courts incline to balance carefully the equities of all who maintain conflicting lien rights against one another; determining upon all the circumstances which party should have priority. Possession *bona fide* acquired and maintained on the faith of a valuable service or payment is a most decisive circumstance in such cases; and especially needful is a delivery or procuring possession of the thing where the pledge transaction rests upon parol proof of words and conduct.

§ 200. **Bailment in Pledge pending full Performance.**—III. Bailment in pledge pending full accomplishment of the secured undertaking. The situation of the pledge parties towards the thing, after the transfer of possession has been virtually completed, becomes that of bailor and bailee under a mutual-benefit bailment. What, then, are the pledgee's duties, and what his rights, while the debt is maturing, or the engagement outstanding, for which the pledge was given?

§ 201. **Duty of Pledgee to keep Possession.**—I. As to his duties. What at once impresses us as characteristic of this bailment is, that principal and collateral work along together towards one primary attainment: namely, the discharge of some debt or duty which is owed to the bailee; so that to disjoin the two would be fatal to the pledge. Of the first importance is it, then, to every pledgee to keep the bailment in force by maintaining the pledge possession he has acquired. For whenever, by delivering back the thing to his pledgor, he manifests a willingness to abandon such possession, the benefit of his security is lost, and bailment and pledge come to an end;¹ notwithstanding which the principal debt or obligation

¹ Story Bailm. § 229; *Reeves v. Capper*, 5 Bing. N. C. 136; *Whitaker v. Sumner*, 20 Pick. 399; *Day v. Swift*, 48 Me. 368; *Collins v. Buck*, 63 Me. 459; *Black v. Bogert*, 65 N. Y. 601. Allowing the pledgor to with-

continues as before, and to secure it there might be some later pledge contract with a new taking of possession.

We are still to observe, however, that a pledgor may gain repossession as the pledgee's authorized bailee or agent, or wrongfully; and in either case the pledgee's right would not be necessarily lost. Hence, the fact of redelivery or repossession remains open to explanation; and if the thing pledged appears to have been redelivered to the pledgor for a temporary purpose only, and upon the understanding that it shall be afterwards returned, the pledgee may demand and recover it again.¹ Nor will the property be beyond the pledgee's reach where he lets his pledgor keep or regain possession or control purely as his agent for custody, sale, or other purpose not inconsistent with the enforcement of his own lien.² The pledgor's wrongful repossession of the thing, whether by force or stratagem, cannot debar the pledgee's rights,³ and may, if obtained with felonious intent, be punished as larceny.⁴ And even where the chattel was redelivered, solely for substituting some other security or making a collection, the pledgor's breach of his special trust would justify the pledgee in suing him as for converting the original security.⁵

draw the collateral on his individual check, is an instance in point. *Citizens' Nat. Bank v. Hooper*, 47 Md. 88. And, in general, permitting the pledgor to exercise full dominion and control. *Casey v. Caveroc*, 96 U. S. 467.

¹ *Reeves v. Capper*, 5 Bing. N. C. 136; *Cooper v. Ray*, 47 Ill. 53; *Macomber v. Parker*, 14 Pick. 497; *Hutton v. Arnett*, 51 Ill. 198.

² *Thayer v. Dwight*, 104 Mass. 254; *Thorndike v. Bath*, 114 Mass. 116; *Rawson, in re*, 2 Lowell. 519.

³ *Roberts v. Wyatt*, 2 Taunt. 268; *Soule v. White*, 14 Me. 436; *Walcott v. Keith*, 2 Fost. 196; *Hays v. Riddle*, 1 Sandf. 248; *Way v. Davidson*, 12 Gray, 465; *Gibson v. Boyd*, 1 Kerr (N. B.), 150. In *Coleman v. Shelton*, 2 McCord, Ch. 126, equity took jurisdiction to compel the pledgor, who had wrongfully dispossessed, to redeliver the thing to the pledgee.

⁴ *Bruley v. Rose*, 57 Iowa, 651.

⁵ *Way v. Davidson*, 12 Gray, 465; *Hays v. Riddle*, 1 Sandf. 248; *White v. Platt*, 5 Denio, 269.

§ 202. **The same Subject.**—But all this, the reader will perceive, establishes only the pledge continuance in such a case as between the parties themselves. Whether, under circumstances of redelivery without intending to abandon his security, the pledgee can follow the thing into the hands of some *bona fide* holder for value, to whom the pledgor has meantime transferred it, is quite another matter; and, in some instances, he manifestly cannot.¹ Here reappear those distinctions lately dwelt upon, which favor the pledgee not in full possession, more especially as against his pledgor; with whom, even were one pledge allowed to end, the executory contract for another might subsist.² As against payments or advances by third persons who may have acquired rights *in rem* honestly and without notice, while the pledgee is intentionally and carelessly out of possession (however deceitfully induced to part with the thing), the safer opinion is that the pledge is no longer of avail.³ According to Judge Story, whose summary of the common law on this point may be thought misleading, modern continental Europe favors the pledgee who gives possession to his pledgor less than did the Roman empire.⁴ Yet, whenever the pledgee's dispossession by his pledgor is under circumstances imputing to himself no fault or delay, nor a voluntary consent, we presume that, unless the property be of that negotiable character which gives to every *bona fide* holder for value a clear title, the pledgee will be allowed to regain the thing, even as against intervening lien-creditors of the pledgor, who had supposed the property unincumbered.⁵

¹ Bodenhammer v. Newsom, 5 Jones L. 107; Way v. Davidson, 12 Gray, 465, 467.

² See White v. Platt, 5 Denio, 269; Way v. Davidson, 12 Gray, 465.

³ Babcock v. Lawson, 5 Q. B. D. 284; Walker v. Staples, 5 Allen, 34; Kimball v. Hildreth, 8 Allen, 167; Beeman v. Lawton, 37 Me. 543; Shaw v. Wilshire, 65 Me. 485; *supra*, § 201. But see Reeves v. Capper, 5 Bing. N. C. 136.

⁴ Story Bailm. § 299.

⁵ *Ib.*

Here once more the element of seasonable notice confronts us. By vigilance and seasonable notice of his claim to third parties before they acquire adverse claims upon the thing, a pledgee may preserve his rights unimpaired, even though not retaining strict personal possession thereof;¹ for thus is the third party deprived of that *bona fide* character which gives him a priority, as one misled to his detriment without fault and innocently. If the third party receives notice too late for his own priority to be lost, he ought at least to regard the pledgee's claim fairly.²

§ 203. **The same Subject.** — Where the pledgee redelivers the thing to the pledgor for some temporary purpose, and on its accomplishment receives possession again, the pledge will prevail once more over liens on the thing afterwards acquired by third persons; for, even were the old pledge no more, a new and valid one would thus be completely constituted.³

By wantonly or negligently abandoning possession to some third person, the pledgee loses his security upon the thing; as, for instance, where he thus permits it to be attached in the suit of another creditor of the bailor,⁴ or willingly subordinates his own lien to another's.⁵ But the pledgee's attachment of the thing in his own suit, as a means of enforcing his rights on his pledgor's default, has been held, under local practice, no such waiver of the pledge;⁶ nor, as it seems, should his simple promise to abandon the pledge, before the third person has taken advantage of it. Any pledgee who voluntarily surrenders the thing to another creditor, taking

¹ *Palmtag v. Doutrick*, 59 Cal. 154; *Carrington v. Ward*, 71 N. Y. 360.

² See *Hazard v. Fiske*, 83 N. Y. 287, where the third party might, if he chose, have protected both the defrauded pledgee and himself from property of the pledgor which he held when the notice reached him.

³ *Cooper v. Ray*, 47 Ill. 53.

⁴ *Whitaker v. Sumner*, 20 Pick. 399; *Story Bailm.* § 299.

⁵ *Mills v. Stewart*, 5 Humph. 308; *Treadwell v. Davis*, 34 Cal. 601.

⁶ *Arendale v. Morgan*, 5 Sneed, 703. But cf. *Story Bailm.* § 366.

the latter's guaranty in place of the pledge, loses the pledge security for himself; but, if the intent were that the new creditor should hold the thing as security for both debts, and the pledgor assented to this arrangement, the tripartite agreement would take effect.¹ It is, of course, no abandonment of a pledgee's possession that he makes some one his bailee or agent for the care and custody of the pledge.²

A pledgee who has been fraudulently induced to release the property pledged and to receive bills of exchange instead, does not, by suing on the bills, waive his right to reclaim the pledged property upon ascertaining the fraud; and he may reassert his claim against the pledgor and any one else who was privy to the fraud.³

§ 204. **Measure of Care and Diligence as Bailee.** — We next inquire what degree of diligence towards the thing pledged our law exacts. The rule is essentially that which applies to the other bailments for mutual benefit already examined; namely, by reason of delivery and acceptance and a transfer of the thing to his keeping, the pledgee becomes bound to exercise ordinary care and diligence towards it, and, to a corresponding extent, is answerable for negligence. This is the rule of continental Europe, as well as of England and America; modern civilians and common-law jurists placing the same limits to the pledgee's liability.⁴ Ordinary diligence is

¹ Treadwell v. Davis, 34 Cal. 601.

² Ingersoll v. Van Bokkelin, 7 Cow. 670; Jones v. Baldwin, 12 Pick. 316; Story Bailm. § 324. As to the agent for the pledgee being the pledgor himself, see *supra*, § 193.

³ Easton v. Hodges, 18 Fed. Rep. 677.

⁴ 2 Kent Com. 578; Story Bailm. § 332; Jones Bailm. 23, 75; Dig. 13, 6, 5, 2; ib. 13, 7, 14; Bracton, 99 *b*; 1 Bell Comm. 453; Pothier Contrat de Nantissement, n. 32-34; 2 Ld. Raym. 916, 917; Commercial Bank of New Orleans v. Martin, 1 La. Ann. 344; Third Nat. Bank v. Boyd, 44 Md. 47; Erie Bank v. Smith, 3 Brewst. (Pa.) 9; Girard Fire Ins. Co. v. Marr, 46 Penn. St. 504; Scott v. Crews, 2 S. C. x. s. 522; Petty v. Overall, 42 Ala. 145; Wells v. Wells, 53 Vt. 1; St. Losky v. Davidson, 6 Cal. 643.

a relative term here as elsewhere, and signifies that diligence which persons of common prudence usually bestow towards such property or upon their own property at the time and place in question and under like circumstances; or, if the pledge be to bankers or others whose vocation implies skill or unusual facilities, such diligence as those commonly prudent of that class are wont to observe in such affairs.¹

It follows that, if the pledge be lost by casualty or unavoidable accident, or be taken or destroyed by superior force, or if it perish from some intrinsic defect or weakness, and no act was done or omitted by the pledgee in the premises which can be construed into culpable negligence or misconduct contributing to the loss, the pledgee cannot be held answerable.² Nor is a pawnbroker liable for pawned articles stolen from his shop by burglars if he exercised ordinary diligence.³

It was observed, in an old case, "If a man bails me goods to keep, and I put them among my own, I shall not be charged if they be stolen."⁴ But this is no true criterion of a bailee's responsibility.⁵ Again, Sir William Jones argues that a distinction should be drawn between the taking of the pledge by robbery, and stealing or taking it by stealth, so as to presume against the pledgee in the latter, but not in the former case.⁶ The sounder views of Judge Story and Chancellor Kent on this point, which give tone to the latest decisions, are that theft of itself establishes neither responsibility nor irresponsibility in the bailee; and that the true question in any case is whether, in view of all the circumstances, there was, apart from a pledgee's wrongful conduct,

¹ *Ib.*

² *Scott v. Crews*, 2 S. C. N. S. 522; *Erie Bank v. Smith*, 3 Brewst. (Pa.) 9.

³ *Abbett v. Frederick*, 56 How. (N. Y.) Pr. 68.

⁴ Year Book, 29 Lib. Assis. 28; Bro. Abr. Bailment, pl. 7.

⁵ See *Erie Bank v. Smith*, 3 Brewst. 9; *supra*, § 36.

⁶ *Jones Bailm.* 75, 119.

ordinary negligence, or, in other words, the failure in fact on his part, to exercise ordinary diligence.¹

§ 205. **The same Subject.** — The uncertainty of our modern authorities as to the presumption of negligence on a bailee's part is elsewhere alluded to.² But it certainly appears reasonable to so far presume against the pledgee, in case he fails to return the thing when he ought, or returns it badly injured, as to require at least an explanation of how the loss or injury occurred; which explanation once satisfactorily given, and the evidence failing to show a want of ordinary care on his part, he cannot be charged;³ while, on the other hand, if he gives no satisfactory explanation he should be held liable, unless the injury appears due to some other cause.⁴ The nature of the suit and the stage of proceedings might affect the burden of proof; but it should be borne in mind that whether ordinary diligence was exercised is mainly a question of fact for a jury upon all the proof, and that the want of such diligence may appear in acts of omission as well as commission.⁵

§ 206. **Rule applied where more than Custody is expected; Collection, etc.** — The pledgee's bailment service is most naturally that of custodian only; but under certain circumstances more than a mere custody is expected; and the true intentment of the transaction should prevail. Thus, when promissory notes or other negotiable instruments are taken as collateral, which must mature before the principal obligation, it

¹ Story Bailm. §§ 334-338; 1 Co. Inst. 89 *a*, which is criticised, *ib.*, and in Jones Bailm. 75; 2 Kent Com. 580, 581; Third Nat. Bank *v.* Boyd, 44 Md. 47; Scott *v.* Crews, 2 S. C. x s. 522; Erie Bank *v.* Smith, 3 Brewst. 9; Petty *v.* Overall, 42 Ala. 145; Dearborn *v.* Union Nat. Bank, 61 Me. 369.

² *Supra*, § 23.

³ *Ib.*; Story Bailm. § 338; 2 Kent Com. 580, 581. As to the civil-law rule, see Pothier Contrat de Nantissement, n. 31.

⁴ Stuart *v.* Bigler, 98 Penn. St. 80.

⁵ See Third Nat. Bank *v.* Boyd, Erie Bank *v.* Smith, and Scott *v.* Crews, *supra*; Story Bailm. § 342.

should be presumed that the pledgee was expected to take heed to preserve the value of what he held in possession. Hence the rule, sometimes too broadly asserted, that the pledgee of negotiable paper has no right, unless specially empowered, to keep the pledge ready for sale on default, but must collect it, and apply the proceeds to the principal debt.¹ The true idea to be conveyed is, that the parties must be presumed to have contracted for applying the collateral in the manner which best consists with the rights of both. Perhaps the pledgee in a doubtful case might notify his pledgor, and give the latter an opportunity of collecting the security in his stead; but here he would have the disadvantage of parting with his own possession. Hence we say that, by virtue of a transferred possession, by way of pledge, negotiable securities soon to mature must, as a rule, be presented by the pledgee for collection with ordinary diligence, and made available in cash. Should, then, the pledgee suffer indorsed paper given him as security to lie idly in his hands, so that through the want of a legal demand the indorser is discharged, any loss ensuing therefrom must be borne by himself;² so, for similar reasons, his supine negligence in prosecuting an overdue note which he took for security will expose him to hazardous consequences,³ or his failure to follow up the parties primarily liable on the negotiable security.⁴ But wherever the pledgee is thus bound to take active measures upon his security, ordinary diligence and skill continue the full measure of his

¹ *Wheeler v. Newbould*, 16 N. Y. 392; *Overlock v. Hills*, 8 Me. 383; *Slevin v. Morrow*, 4 Ind. 425; *May v. Sharp*, 49 Ala. 140; *Reeves v. Plough*, 41 Ind. 204; *Foote v. Brown*, 2 McLean, 369; *Goodall v. Richardson*, 14 N. H. 567.

² *Whitten v. Wright*, 31 Mich. 92; *Russell v. Hester*, 10 Ala. 535.

³ *Wakeman v. Gowdy*, 10 Bosw. 208; *Word v. Morgan*, 5 Sneed, 79; *Mullen v. Morris*, 2 Penn. St. 85; *Rice v. Benedict*, 19 Mich. 132; *Hanna v. Holton*, 78 Penn. St. 334; *Noland v. Clark*, 10 B. Monr. 239.

⁴ *Lamberton v. Windom*, 12 Minn. 232; *Douglass v. Mandine*, 57 Tex. 314; *Betterton v. Roope*, 3 Lea, 215; *Barrow v. Rhinelander*, 3 Johns. Ch. 614; *Sample Co. v. Detwiler*, 30 Kan. 386.

responsibility;¹ and to demand more would require an express contract, on his part, to be more strictly bounden.²

The pledgee does not, by here suing upon the collateral note in his own name, become the surety of his pledgor.³ Should the principal debt be meanwhile paid him, or the secured engagement fulfilled, the pledgee ought rather to return such securities than continue to hold and attempt collecting them;⁴ since no pledgee can be forced to accept such security in part-payment of the principal undertaking.⁵

§ 207. **The same Subject.** — There are other instances in which more than a mere custody may be naturally inferred from the circumstances of the bailment. Thus, if an overdue claim or indebtedness is taken in security, we may presume that the pledgee was to attempt its collection, or at least to co-operate actively with the pledgor in thus realizing upon the pledge.⁶ The measure of responsibility here, however, is ordinary diligence, as before.

Upon the same principle a creditor secured by a life-insurance policy has been required, in pursuance of the undertaking, to keep up carefully the premiums and save the security from lapsing;⁷ and in various instances must the pledgee use ordinary care in collecting coupons or interest instalments accruing on pledged securities,⁸ or attending to the breed of pledged animals.

¹ *Roberts v. Thompson*, 14 Ohio St. 1; *Reeves v. Plough*, 41 Ind. 204; *Noland v. Clark*, 10 B. Monr. 239; *Wells v. Wells*, 53 Vt. 1.

² *Lee v. Baldwin*, 10 Ga. 208; *Roberts v. Thompson*, 14 Ohio St. 1; *Drake v. White*, 117 Mass. 10; *Marschuetz v. Wright*, 50 Wis. 175.

Where the amount of the note is lost, not through the pledgee's failure to present and protest, but because the maker was already insolvent, the pledgee is not chargeable. *Westphal v. Ludlow*, 2 McCr. 505.

³ *Cardin v. Jones*, 23 Ga. 175.

⁴ *Overlock v. Hills*, 8 Me. 383.

⁵ *Reeves v. Plough*, 41 Ind. 204; *Burrows v. Bangs*, 31 Mich. 304.

⁶ *Wakeman v. Gowdy* and other cases, *supra*; *Whitteker v. Charleston Gas Co.*, 16 W. Va. 717 (where city scrip was pledged).

⁷ *Soule v. Union Bank*, 45 Barb. 111.

⁸ *Whitin v. Paul*, 13 R. I. 40.

§ 208. **The same Subject.** — So strongly does the law defer to the mutual intent of the pledge parties, that an obligation on the pledgee's part to collect, sue, or do more than keep custody of the securities is, when enforced, more frequently because they evidently so intended, than as a matter to rest upon mere presumption; except, perhaps, in transactions where the short paper of third parties is given in pledge, and a due presentment on maturity is both a needful and inexpensive, not to add customary, formality.¹ It is less strenuously asserted where, in the case of overdue paper, claims, and demands, generally, it was plain that the only worth of the security, when taken, consisted in using favorable opportunities for reducing the thing to cash. The pledgee of stock is not to watch the market fluctuations and sell on good opportunity, but the pledgor should at least notify him when he deems it prudent to sell.² Receiving in pledge long paper or other negotiable collaterals which are not to mature until considerably later than the principal debt or engagement, justifies the presumption that the pledgee was not to wait and collect, but might sell them like any other pledge, should the pledgor be in default.³ And even where bound to collect the security at all, the pledgee's responsibility, we must bear in mind, is limited to the actual loss to which his negligence may have contributed.⁴ He would apparently be justified under any circumstances in returning the collaterals seasonably to the debtor and getting altogether rid of the

¹ See *Goodall v. Richardson*, 14 N. H. 567; *Rice v. Benedict*, 19 Mich. 132.

² *Richardson v. Ins. Co.*, 27 Gratt. 749. See further as to remedies on default, *post*.

³ *Morris Canal Co. v. Lewis*, 1 Beasl. 323; *Fraker v. Reeve*, 36 Wis. 85; *Richards v. Davis*, 5 Penn. L. J. 471. In various instances it will appear that the pledgor, in order to charge the pledgee with negligence in realizing on the security, ought at least to quicken him by notice, and not be himself inert.

⁴ See *Steger v. Bush, Sm. & M. Ch.* 172; *Barrow v. Rhinelanders*, 3 Johns. Ch. 614; *Grove v. Roberts*, 6 La. Ann. 210.

burden of attempting to realize upon them ; forfeiting thereby a pledge of little or no advantage to him.

§ 209. **Pledgee's Employment of Agents.**— In employing his own agents about the pledge, the pledgee, like a hired custodian or workman, is ordinarily bound to the pledgor for their negligence as for his own ; though not for their torts, as it would appear, unless his own negligence or wrong contributed to the loss.¹ But it is held that a pledgee who employs a lawyer for his professional skill to pursue securities in the courts is not responsible for the latter's neglect or misconduct, if he chose him with reasonable care.² Where liable to the pledgor for the negligence of his own agents, the pledgee may treat the agent as liable to himself ; but he is not answerable for the negligence of those whose agency is derived from the pledgor. These doctrines apply in the case of a corporate pledgor or pledgee, as well as to individuals who choose to become principals in such bailment transactions.³

§ 210. **Good Faith must be exercised.**— Every pledgee is bound to exercise good faith, as well as due diligence, with reference to the chattel in his keeping. He should not transfer it as the full owner thereof, nor misappropriate, nor put it to a different use from that mutually intended, nor refuse to deliver up the pledge without good excuse upon the pledgor's fulfilment, or offer to fulfil, all that the principal engagement bound him to ; and if the pledgee so misconducts, he will be held strictly answerable for the safety of the pledge as a tortious possessor.⁴ Nor should a pledgee as

¹ *Supra*, § 108; *St. Losky v. Davidson*, 6 Cal. 643; *Androscoggin R. v. Auburn Bank*, 48 Me. 335.

² *Commercial Bank v. Martin*, 1 La. Ann. 344.

³ See *Androscoggin R. v. Auburn Bank*, 48 Me. 335; *Third Nat. Bank v. Boyd*, 44 Md. 47; *Dearborn v. Union Nat. Bank*, 61 Me. 369. Where directors of a bank carelessly leave the entire management to the president without supervision, the bank may be charged if the president abstracts securities which were left to secure a note given to the bank. *Cutting v. Marlor*, 78 N. Y. 454.

⁴ *Coggs v. Bernard*, 2 Ld. Raym. 909, 916, 917; *Parks v. Hall*, 2

against his pledgor volunteer the title of a third person to the thing.¹

§ 211. **Pledgee's Rights; Right to use the Pledge considered.**

—II. As to the pledgee's rights. An important right to be considered is that of using the thing pledged. Judge Story, relying largely upon ancient decisions, has summed up our law in these five propositions: 1. If the pawn is of such a nature that its due preservation requires some use, such use is not only justifiable, but indispensable to the faithful discharge of the pawnee's duty. 2. If the pawn would be worse for the use, as the wearing of clothes which are deposited, its use is prohibited to the pawnee. 3. If the pawn is such that its keeping is a charge to the pawnee, the pawnee may use it, by way of recompense (as they say) for the keeping. 4. If the use will be beneficial to the pawn, or it is indifferent, there it seems that the pawnee may use it; as, if the pawn is of a setting dog, it may well be presumed that the owner would consent to the dog's being used in partridge shooting, and thus confirmed in the habits which make him valuable. 5. If the use will be without any injury, and yet the pawn will thereby be exposed to extraordinary perils, the use is by implication interdicted. These principles he considers are founded in the presumed intent of the parties; and, by way of illustration, he allows that a pawned cow may be milked, a pawned horse ridden, and pawned books read; but he does not agree with Sir William Jones, that pawned jewels may be worn.²

Notwithstanding our few early cases on this subject may support distinctions like these, we apprehend they becloud the true principle of the present bailment; namely, that a

Pick. 206; Story Bailm. § 341; *supra*, § 17; *Lawrence v. Maxwell*, 53 N. Y. 19. But as to the pledgee's right to sub-pledge, see *post*.

¹ 49 N. Y. Super. 226; *supra*, § 218.

² Story Bailm. §§ 329, 330; *Coggs v. Bernard*, 2 Ld. Raym. 909, 917; *Mores v. Conham*, Owen, 123. Upon the right to wear pawned jewels, however, Sir William Jones does not express himself very clearly. *Jones Bailm.* 81.

pledgee neither has the right to derive personal profit from the pledge, nor is under obligation to incur personal charge about it; but that, on a final reckoning, the profit or beneficial use goes really to the credit of the pledgor, and the pledgee's personal charges, suitably incurred in course of the bailment, to his own credit. And although, in a very old case, it was ruled that the pawnee might, for his own use, work a pawned horse, or milk a pawned cow,¹ this was probably on the supposition that the use neither more nor less than compensated for the care of the animal. A pledgee's free use beyond this can only be justified on the ground that in trivial matters one need not try to be too precise. For what court would hold that milk or work from a whole herd was the pawnee's profit apart from the debt for which the animals were pawned; or that the offspring of the herd was his special gain? The Roman and the French law put the principle justly in permitting pledged cows to be milked and pledged horses to be worked (which, indeed, is essential to the health of such creatures), while requiring the pledgee to account for the value thereof, and of the offspring besides, with a right to deduct the reasonable charges of their nourishment.² Nor can we well assent to the ancient common-law distinction between things worse and things not worse for the use; for might not a pledgee's use of certain pledged books be more injurious than his use of certain pledged articles of clothing or jewels? But another consideration carries some weight; namely, that it is humiliating and otherwise properly distasteful to a cleanly owner to have his private garments and ornaments worn promiscuously on other persons, whether actual injury thereby results or not.

§ 212. **Pledgee should account for Profitable Use.**—Our pledge transaction has become too important to turn on petty instances. Giving full rein to the presumed intention

¹ *Mores v. Conham*, Owen, 123.

² *Jones Bailm.* 82; *Pothier Contrat de Nantissement*, n. 35.

of parties, we may say that mutual intention is variable like custom itself. And the only rational doctrine as to use of the pledge appears to be this: that the profits of the bailment belong to the pledgor, while the expenses swell his indebtedness to the pledgee, on their mutual reckoning; that the pledgee has no right to a personal use, without permission, beyond what is incidental to the exercise of ordinary care in preserving the thing; but that this incidental use and the charge of keeping may, in trifling instances, be taken as intended for a mutual offset. It follows that if the pledge consist in good stock, or other valuable securities, yielding dividends and profits, the pledgee cannot avail himself of the dividends or profits, save as in discharge *pro tanto* of the secured debt or engagement, and (if such there be) of accruing interest.¹ And although, as a rule, the pledgee, in the absence of special agreement, is not bound to put the pledge out for hire, yet where he does so, the net profit he makes, as well as general natural products, increase, increment, and offspring of the pledge, will go, less the proper expenses incurred, and perhaps a fair remuneration for the special service, to the pledgor's account in discharge of the secured indebtedness.²

§ 213. **Antichresis; or Keeping down Interest by Profits.**— So profitable, indeed, might be the use of a pledge, that the Roman law recognized a peculiar transaction, known as *Antichresis* (to which the unpopular “Welsh mortgage” of our law largely corresponded), whereby a creditor was empowered to take his debtor's property, real or personal, into his own control, and use the profits thereof, by way of keeping

¹ 2 Kent Com. 578, 579; Pothier Contrat de Nantissement, n. 35; Story Bailm. § 331; Androscoggin R. v. Auburn Bank, 48 Me. 335; 8 Mo. App. 118. See Lawrence v. Maxwell, 53 N. Y. 19; Thompson v. Patrick, 4 Watts, 414.

² Geron v. Geron, 15 Ala. 562; Houton v. Holliday, 2 Murph. 111; Story Bailm. § 343; Hunsaker v. Sturgis, 29 Cal. 142; Gilson v. Martin, 49 Vt. 474.

down interest. It is probably more because of its oppressiveness to the debtor than any inconvenience which the creditor himself might suffer, that we find so little trace of this transaction in modern jurisprudence.¹

§ 214. **Right to hold Pledge and Increments for Security.**— A pledgee who uses the pledge so as to damage it is liable for any failure to exercise ordinary diligence; but not to the extent of forfeiting his pledge security.² And he may hold the profits and income of the pledge, together with its products and natural increase, as accessory to the original security and for the same purpose.³ But in the absence of any agreement to the contrary, all property pledged as security for a debt reverts to the original owner when the pledge is extinguished.⁴

§ 215. **Rule as to incurring Charges, etc.**— Necessary and proper expenses incurred by a pledgee about the thing pledged must, therefore, be reimbursed by the pledgor; and this includes the reasonable charges incurred for its keep and preservation, for protecting the title, or for making the security available on maturity.⁵ Assessments rightfully paid upon pledged stock are a proper charge for adjustment with the pledgor.⁶ For all such expenses the pledge becomes security; including, as it would appear, even those which are extraordinary, if needful and proper under the peculiar circumstances;⁷ but expenses and charges excessive in amount, or incurred out of the line of the pledgee's duty, are, unless the pledgor authorized them, chargeable neither

¹ Story Bailm. § 344; *Livingston v. Story*, 11 Pet. 351.

² *Thompson v. Patrick*, 4 Watts, 414.

³ Story Bailm. § 292.

⁴ See *Merrifield v. Baker*, 9 Allen, 29, where this rule is applied so as to render the pledgee accountable for return premiums received on an insurance policy.

⁵ *Starrett v. Barber*, 20 Me 457; *Hurst v. Coley*, 22 Fed. R. 183.

⁶ *McCalla v. Clark*, 55 Ga 53.

⁷ 2 Kent Com. 579; *Pothier Contrat de Nantissement*, n. 61. This is the rule of the French and Louisiana Codes. *Ib.*

against the latter personally nor upon the pledge.¹ As to charges for the pledgee's own services, this is a matter of delicacy, and must depend largely upon mutual intent and the peculiar circumstances of each case. A pledgee's personal use of the thing, incidentally to its custody, should here be taken into account against him, nor ought compensation for ordinary performance to be readily allowed, in the absence of usage or some suitable stipulation in advance. The allowance of interest on the principal debt fulfils in many pledge transactions the object of such compensation; but interest or special compensation, wherever properly allowable to a pledgee, will be covered by the security;² and, where benefit accrues to the pledgor from the pledgee's special exertion, a special remuneration might not unreasonably be claimed.

§ 216. **Whether Pledgee of Stock can vote.**—The pledgee of stock has, apparently, no right to vote upon it as owner;³ and, at all events, he ought not, where, under the mode of acquiring transfer, he has escaped the liabilities of a stockholder.⁴ But the fact that the pledgee so votes does not amount to conversion of the pledge.⁵

§ 217. **Pledgee's Right to undisturbed Possession, etc.**—The pledgee has the right to an undisturbed possession of the thing pledged to him during the full accomplishment of the bailment purpose; and hence may sue, not only the pledgor, but all third persons who wrongfully invade this right.⁶ He

¹ See *Story Bailm.* §§ 306 *a*, 343. As to costs in such suit, see *Blake v. Buchanan*, 22 Vt. 548.

² *Story Bailm.* § 306.

³ *McDaniels v. Flower Brook Manuf. Co.*, 22 Vt. 274; 26 Hun (N. Y.), 453.

⁴ See *Newton v. Fay*, 10 Allen, 505.

⁵ *Heath v. Silverthorn Co.*, 39 Wis. 147. But pledgor may have pledgee restrained from voting. 26 Hun, 453.

⁶ *Gibson v. Boyd*, 1 Kerr (N. B.), 150; *Story Bailm.* § 303; 2 Kent Com. 585; *Ayers v. South Australian Banking Co.*, L. R. 3 P. C. 518; *Lyle v. Barker*, 5 Binn. 457; *Treadwell v. Davis*, 34 Cal. 601. As to dispossession by the pledgor, and its consequences, see *supra*, § 201.

may seek to recover the chattel in replevin, or sue in damages as for its tortious dispossession.¹ This accords with our general law of bailments.² None can obstruct his prompt pursuit and recovery, under such circumstances, save the party who can show a better title; and any interest derived in the thing through the wrongdoer, however honestly acquired by some third person, and handsomely paid for, must, except as to negotiable securities, yield to the pledgee's right of precedence.³ The measure of damages in his suit against third persons for dispossession is the full value of the pledge, and not merely his own interest as pledgee,⁴ but as against a pledgor (if he be the aggressor) and those in privity with him, only his special interest as pledgee.⁵

§ 218. **Right of Pledgee to assign; Effect of Sub-Pledge, etc.**—As distinguished from bailees with merely a lien, our law allows one in possession of a pledge an extensive right of transfer. It has long been admitted that a pledgee may assign over the pledge so that the assignee shall take it subject to all the responsibilities under the original pledge transaction; or may deliver it into the hands of a stranger for safe custody; or may convey his interest conditionally by way of pledge to another person; in all of which cases his security will not be destroyed or impaired.⁶ The right is

¹ *Ib.* Whether the pledgee may enjoin the seizure by another creditor, see 34 La. Ann. 389; § 221, *post*.

² *Supra*, §§ 22, 115.

³ *Noles v. Marable*, 59 Ala. 366; *Harker v. Dement*, 9 Gill, 7; *Adams v. O'Connor*, 100 Mass. 515; *United States Express Co. v. Meinto*, 72 Ill. 293. If a sheriff may take the property out of the hands of the pledgee, his sale on execution is subject to the pledgee's claim. § 221, *post*.

⁴ *Swire v. Leach*, 18 C. B. N. S. 479; *Adams v. O'Connor*, 100 Mass. 515; *Pomeroy v. Smith*, 17 Pick. 85; *Harker v. Dement*, 9 Gill, 7.

⁵ *Treadwell v. Davis*, 34 Cal. 601; *Brownell v. Hawkins*, 4 Barb. 491; *Benjamin v. Strempel*, 13 Ill. 466.

⁶ *Story Bailm.* §§ 314, 322-324; *Mores v. Conham*. Owen, 123; *Whitaker v. Sumner*, 20 Pick. 399; 2 Kent Com. 579; *Shelton v. French*, 33 Conn. 489; *Belden v. Perkins*, 78 Ill. 449; *Ashton's Appeal*, 73 Penn. St. 153; *Whitney v. Peay*, 24 Ark. 22; *Van Blarcom v. Broadway Bank*,

here more liberally conceded than in the case of a mere lien claimant. But any such act on the pledgee's part is understood to be subject to all the original restrictions; for to attempt to pledge property beyond the pledgee's own demand, or to make transfer as though he were the absolute owner, is regarded as a breach of trust and a fraud upon the original pledgor;¹ so that the pledgee's creditors can in general acquire no title in the property beyond that of the original pledgee himself. And it may be questioned whether, under some circumstances, and as to certain kinds of chattels whose intrinsic qualities were presumably regarded, such as a valuable work of art, or private garments, a fair construction of the pledge contract would admit of passing the custody on to strangers at all, at the mere discretion of the pledgee, apart from his pledgor's special permission;² for wherever the true intendment of the transaction was to restrain the pledge security to the pledgee personally, that intendment must prevail.³

§ 219. **The same Subject.** — But whether the pledgee's transfer in breach of trust shall so impair his security as to give the pledgor a right to reclaim the chattel on other or better terms than before the transfer, and regardless of what he owed, is quite different. Indeed, according to many of the latest American cases which follow late English precedents, the lien of the pledge must still prevail against the pledgor. Particularly is this true where the breach of trust appears rather a technical one than wholly wrongful in intent; as if the pledgee should merely sub-pledge or assign over for a greater amount than was actually due him. The modern

37 N. Y. 540; *Proctor v. Whitcomb*, 137 Mass. 303. See *Heath v. Griswold*, 18 Blatch. 555, where one transferred to avoid liability as stockholder.

¹ Story Bailm. § 324.

² See Cockburn C. J., and Blackburn, J., in *Donald v. Sackling*, L. R. 1 Q. B. 585, 615, 618.

³ See § 225, *post*, as to special contract.

custom of pledging marketable commodities and securities for which a money equivalent can easily be supplied, and the convenient practice, further, of recouping damages where contracts are sued upon, incline courts still further to the negative. A pledgee's overdealing with the thing pledged appears in England and many parts of the United States to be now regarded, not as utterly annihilating the pledge contract, nor extinguishing the pledgee's interest in the chattel thereunder; but as simply making the transfer so far inoperative against the pledgor, that the latter may recover possession by tendering what he owes.¹ Perhaps there might be a tortious dealing by the pledgee so utterly inconsistent with his pledge undertaking as to terminate the contract altogether; but such certainly is not the usual consequence of his sub-pledge beyond his own demand.² Hence the prevailing modern rule, thus far applied to corn, claim-vouchers, dock-warrants, marketable commodities, and securities, generally, which are easily replaced or paid for, that the pledgor cannot recover the chattel in replevin or a suit for damages from the sub-pledgee or a *bona fide* purchaser from the pledgor for value, without having first paid or tendered the amount of the debt for which the thing was pledged; and this, notwithstanding the pledgor's transfer was in breach of trust.³ In favor of

¹ *Johnson v. Stear*, 15 C. B. n. s. 338; *Donald v. Suckling*, L. R. 1 Q. B. 585.

² *Blackburn, J.*, in *Donald v. Suckling*, L. R. 1 Q. B. 617; *Fenn v. Bittleston*, 7 Ex. 160.

³ The present English rule is to this effect. *Johnson v. Stear*, 15 C. B. n. s. 338; *Donald v. Suckling* (Shee, J., dis.), L. R. 1 Q. B. 585, where the subject is amply discussed. And see *Babcock v. Lawson*, 4 Q. B. D. 394. So is the American rule. See *Talty v. Freedman's Savings Co.*, 93 U. S. Supr. Ct. 321, and the valuable opinion therein delivered by Mr. Justice Swayne; *Jarvis v. Rogers*, 15 Mass. 389; *Lewis v. Mott*, 36 N. Y. 315; *First Nat. Bank v. Boyce*, 78 Ky. 42; *Cherry v. Frost*, 7 Lea, 1; 74 N. Y. 223; *Belden v. Perkins*, 78 Ill. 449; *Bradley v. Parks*, 83 Ill. 169.

As to the wrongful repledge of parcels belonging to different persons, see 6 Abb. N. Cas. 381.

the *bona fide* transferee for value of pledged negotiable securities, not overdue nor put forth wrongfully, another and broader principle of protection might, of course, avail.¹

Even the pledgee, when sued for his wrongful transfer, may, in general, recoup the secured debt in the damages.² But one who violates his contract of pledge by making a sub-pledge of the note or other collectible instrument left with him for security, must respond to the owner for the full amount of such security, unless he clearly proves that it was not worth its face value.³

§ 220. **Pledgor's Right to assign, etc., subject to the Pledge.** — The pledgor, pending accomplishment of the bailment purpose, has rights and duties, with reference to the pledged property; the discussion of which we have in a measure⁴ anticipated. He may sell or assign his own interest in the pledge, subject to the pledgee's rights; in which case his transferee will stand in his place with the right of redeeming the pledge, and holding the pledgee to its diligent care.⁴ So may he pledge and then mortgage his property; thus rendering the mortgagee's interest simply that surplus which might remain after satisfaction of the pledgee's claim.⁵

One who has purchased from the general owner goods in pledge, with knowledge of the pledgee's lien, and receives the goods from the latter accordingly, cannot set off his claim upon the pledgor, but takes subject to the pledgee's lien; and

¹ *Supra*, §§ 182, 192.

² *Belden v. Perkins*, 78 Ill. 499; *Story Bailm.* § 319. See further, as to the pledgee's sale on default, *post*.

³ *Laloire v. Wiltz*, 29 La. Ann. 329.

⁴ 2 Kent Com. 579; *Franklin v. Neate*, 13 M. & W. 481; *Story Bailm.* § 350; *Goss v. Emerson*, 3 Fost 38; *Fisher v. Bradford*, 7 Me. 28; *Van Blarcom v. Broadway Bank*, 37 N. Y. 510.

⁵ *Sanders v. Davis*, 13 B. Monr. 432; *Taylor v. Turner*, 87 Ill. 296. See, for a peculiar instance of assignment by pledgor, *First Nat. Bank v. Root (Ind.)*, 8 N. E. 105.

he cannot set up the pledgee's wrong in defence.¹ This case is to be distinguished from that of a pledgor's sale while the pledgee is out of possession, or where the pledgee surrenders possession without notice of his claim to the purchaser.

§ 221. **Whether Goods in Pledge can be attached, etc.** — At the common law, goods in pawn could not be taken in execution in an action against the pawnor; so long, at all events, as the pawnee's title remained unextinguished;² nor, under like circumstances, be distrained for the pawnor's rent.³ But in some parts of the United States are statutes whose aim is to enable a creditor to reach by legal process in attachment or execution the proceeds of a pledge, to the extent of the pledgor's right to a surplus above what might be needful for satisfying the pledgee's claim.⁴

§ 222. **Pledgor's Bankruptcy or Death.** — A pledgee's rights are not, apart from his consent, impaired or affected by his pledgor's bankruptcy. And it is no conversion for the pledgee to refuse to surrender to his pledgor's assignee in bankruptcy who does not tender him what is due under the pledge.⁵ Nor does a pledgee's right terminate by his pledgor's death.⁶

§ 223. **Pledgor's Right to sue Third Persons.** — The extent of the pledgor's right to sue strangers for wrongfully taking or injuring the pledge has not been fully determined; but

¹ *Carrington v. Ward*, 71 N. Y. 360.

² *Story Bailm.* § 353; *Coggs v. Bernard*, 2 Ld. Raym. 909.

³ *Swire v. Leach*, 18 C. B. n. s. 479.

⁴ *Pomeroy v. Smith*, 17 Pick. 85; *Stief v. Hart*, 1 Comst. 20; *Reichenbach v. McKean*, 95 Penn. St. 432; 31 La. Ann. 865; 34 La. Ann. 389. See *Lamberton v. Windom*, 12 Minn. 232; *Lawrence v. McCalmont*, 2 How. 426.

⁵ *Yeatman v. Savings Institution*, 95 U. S. 764; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Jerome v. McCarter*, 94 U. S. 734. As to the effect upon the security, where both pledgor and pledgee become bankrupt, see *Levi's Case*, L. R. 7 Eq. 449. And concerning the dividends to a pledgee out of a bankrupt estate, see *Weeks's Case*, 8 Ben. (U. S.) 265.

⁶ *Bennett v. Stoddard*, 58 Iowa, 654.

while it may be theoretically true that either the party having the special property, or the general owner, may recover full damages against an intermeddler, courts obviously incline, in practice, to prefer the pledgee; that at all events the pledgor, whose principal debt remains unpaid, or principal engagement unfulfilled, may not oust him of his security.¹ Following the usual rule of bailments for mutual benefit, we may presume that whichever bailment party first sues the third person, the court if invoked will duly protect the interest of the other out of the damages recovered; but in a bailment for security it commonly happens that the pledgee's interest in the thing is as great as the pledgor's or even greater, which is rarely the case in other bailments.

§ 224. **Warranty of Title under a Pledge.**—A pledgor, by the act of pledging, engages in effect, unless he has given his pledgee notice to the contrary, that he is the owner of the property; and hence, if the ownership of any part of the security should prove to be not in him but another, and the pledgee suffer loss by reason of such defective title, the pledgor may be held liable in damages for the breach of contract.² A pledgor of property which he does not own is estopped from setting up any title afterwards acquired during the continuance of the pledge.³ And for the pledgor's fraud, affecting injuriously his pledgee's interest under the pledge contract, the latter may likewise claim indemnity.⁴

But while, as regards any third party who has become purchaser of chattels held in pledge, he who sells such property as owner may be treated as personally liable for their genuineness, the pledgee's intervention in such a transaction,

¹ Story Bailm. § 352. See *supra*, §§ 217, 219; *Swire v. Leach*, 18 C. B. N. S. 479; *Donald v. Suckling*, L. R. 1 Q. B. 585.

² *Mairs v. Taylor*, 40 Penn. St. 446; Story Bailm. § 354; Pothier *Contrat de Nantissement*, n. 54.

³ *Goldstein v. Hort*, 30 Cal. 372.

⁴ Story Bailm. §§ 355, 356; *White v. Platt*, 5 Denio, 269; *Way v. Davidson*, 12 Gray, 465.

to make delivery for the pledgor and owner, and to retain enough of the purchase-money for discharging his own claim, paying the residue to his pledgor, will not amount to a warranty of genuineness on his own part, nor, so long as he acted honestly, render him personally responsible to the purchaser.¹

§ 225. **Effect of Special Contract upon Pledge Transaction.** — The legal rights and liabilities of pledgor and pledgee, which we have now considered, are of course widely susceptible of variation by special contract. Thus their mutual stipulation may require that the pledge be kept, until default of the pledgor, in some particular place or by some particular custodian;² or that the pledgee shall hold possession of negotiable collaterals for the bailor to collect, and not try himself to collect them;³ or that no assignment of the pledge shall be made before default without the pledgor's assent.⁴ And if the pledgee expressly undertakes absolutely to redeliver, on satisfaction of the pledgor's debt, either the pledge or its money equivalent, his rash promise must be kept, even though the thing perished on his hands without his fault.⁵ For a special agreement on some material point once appearing on the part of the pledge parties, not contrary to statute or public policy, this, as in other bailments, will regulate the bailment, and supersede the general law of pledge.⁶

§ 226. **Effect of Bailment on Pledgor's Default, etc.** — IV. Bailment in pledge on the pledgor's default, or upon fulfilment of the secured undertaking. Let us now suppose that

¹ *Baker v. Arnot*, 67 N. Y. 448.

² *St. Losky v. Davidson*, 6 Cal. 643. Cf. *Proctor v. Whitcomb*, 137 Mass. 303.

³ *Lee v. Baldwin*, 10 Ga. 208; *Lawrence v. McCalmont*, 2 How. 426.

⁴ *Supra*, § 218. In *First Nat. Bank v. Root* (Ind.), 8 N. E. 105, it was agreed that the pledgor might withdraw collaterals in proportion as the secured debt was reduced.

⁵ *Drake v. White*, 117 Mass. 10.

⁶ *Supra*, § 20.

the pledgor has failed to pay the secured debt on maturity, or that he otherwise defaults in performance of the principal undertaking. At the common law a pledge does not, in such event, become the absolute property of the pledgee; but he may avail himself of the security for his own satisfaction, or sue upon the main engagement, pursuing both modes, or either.

§ 227. **Pledgee's Remedies on Default; Judicial or Non-Judicial Sale.**—As for proceeding upon his security, there are these two remedies open to his election: 1. To file his bill in chancery, and obtain a judicial sale under a regular decree of foreclosure; a tedious and expensive process, favored in England in Glanville's time, but only to be commended where the pledged property is of much value and powerful conflicting interests are at stake;¹ or where there are many claimants and a doubtful title should be cleared up. 2. After giving reasonable notice of his intention to the pledgor, to sell the thing publicly and fairly (the pledgor's default continuing), without judicial process at all.² This latter summary proceeding, which, though jealously watched by the courts, is commonly preferred as altogether the more expeditious and inexpensive method of gaining satisfaction, deserves examination in detail.

§ 228. **Requirements of the Non-Judicial Sale.**—The non-judicial sale by the pledgee, made under a power incidental to the pledge transaction, regards the pledgor's interests in

¹ 2 Kent Com. 581, 582; Story Bailm. § 310; *Demandray v. Metcalf*, Prec. Ch. 419; *Gilb. Eq.* 104; *Kemp v. Westbrook*, 1 Ves. 278; *Vanderzee v. Willis*, 3 Bro. Ch. 21; *Hart v. Ten Eyck*, 2 Johns. Ch. 62, 100. See *Boynton v. Payrow*, 67 Me. 587; *Chafee v. Sprague Man. Co.*, 14 R. I. 168. In a suit to foreclose a pledge, it cannot be responded that defendant gave the pledge to defraud his creditors. *Chafee v. Sprague Man. Co.*, *ib.*

² 2 Kent Com. 582; Story Bailm. § 310; *Tucker v. Wilson*, 1 P. Wms. 261; *Lockwood v. Ewer*, 2 Atk. 303; cases *infra*; *Stearns v. Marsh*, 4 Denio, 227.

two main particulars: first, in giving him final opportunity to make his principal engagement good, and so prevent the sale; next, in requiring the sale, when made, to be so conducted that the thing may most likely bring all it is worth. In furtherance of these salutary ends the law requires the most scrupulous good faith of him who holds the security.

§ 229. **Sale should be on due Notice, Demand, etc.** — The sale must be upon due and reasonable notice to the pledgor. However informal in expression, this notice should give the pledgor plainly to understand that the pledgee intends selling the thing, because of his default on the secured undertaking, at a certain time and place, unless he meanwhile redeems;¹ and if a demand were needful to put the pledgor in such default, such demand is imperative.² Due notice requires that the time and place of sale be clearly stated;³ nor should the time set for the sale be unreasonably close to the date of serving notice.⁴ But formal notice of the time and place of sale is not a prerequisite, where the pledgor gains actual and seasonable knowledge, and the pledgee's procedure is in fair pursuance of the terms.⁵ Nor would the sale be invalid for want of personal notice to the pledgor, if this party, having gone beyond the seas, left a fully empowered agent in his usual place of business, to whom notice was given instead.⁶ Whether constructive notice, such as newspaper publication,

¹ *Bryan v. Baldwin*, 52 N. Y. 233; *Gay v. Moss*, 34 Cal. 125; *Cushman v. Hayes*, 46 Ill. 145; *Davis v. Funk*, 39 Penn. St. 243; *Stevens v. Hurlbut Bank*, 31 Conn. 146; 3 Col. 551.

² *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Conyngham's Appeal*, 57 Penn. St. 474; *Wilson v. Little*, 2 Comst. 413.

³ *Stevens v. Hurlbut Bank*, 31 Conn. 146; *Washburn v. Pond*, 2 Allen, 474; *Conyngham's Appeal*, 57 Penn. St. 474; *Gay v. Moss*, 34 Cal. 125; *Cushman v. Hayes*, 46 Ill. 145; *Goldsmith v. Church Trustees*, 25 Minn. 202; *Stearns v. Marsh*, 4 Denio, 227; *Millikin v. Dehon*, 10 Bosw. 325. But see *Worthington v. Tormey*, 31 Md. 182, as to notice of the sale of stock.

⁴ *Ib.*

⁵ *Alexandria R. v. Burke*, 22 Gratt. 254.

⁶ *Potter v. Thompson*, 10 R. I. 1.

can ever suffice in the pledgor's absence, is not clearly settled;¹ but the safer, and, as some authorities appear to hold, the only safe course for the pledgee to pursue when his pledgor has absconded and cannot be actually charged with demand and notice, would be to file his bill in chancery.² The requirement of due notice of sale, we may add, is the same on default, whether the pledge secured a debt payable at some future day or payable presently.³

When the time for the repayment of a secured loan was plainly fixed in advance, the pledgee may treat his pledgor as in default, after the appointed time, without an express demand upon him.⁴ But a demand of payment is needful to charge an indorser; and, as regards any pledgor, where no day for payment was stipulated, or there has been an indefinite extension of the principal debt at maturity.⁵ It would appear that the demand and notice of sale may be embraced in one and the same instrument. But the pledgee's notice that he will sell unless an excessive sum is paid him immediately, or the pledgor does something else which he has, as pledgee, no right to demand, is invalid.⁶

§ 230. **Method of Conducting the Sale.**—Next, the non-judicial sale must be at public auction, and not at private sale;⁷

¹ See *Potter v. Thompson*, 10 R. I. 1. Newspaper notice is held sufficient (the sale being in all respects fairly made and for a fair price) in *Stokes v. Frazier*, 72 Ill. 428. And see *City Bank of Racine v. Babcock*, 1 Holmes (U. S. Cir.), 180.

² *Stearns v. Marsh*, 4 Denio, 227; *Donohoe v. Gamble*, 38 Cal. 340; *Pigot v. Cubley*, 15 C. B. N. S. 701. Cf. *City Bank of Racine v. Babcock*, 1 Holmes, 180.

³ *Stearns v. Marsh*, 4 Denio, 227.

⁴ *Martin v. Reed*, 11 C. B. N. S. 730; *Chouteau v. Allen*, 70 Mo. 290.

⁵ *Pigot v. Cubley*, 15 C. B. N. S. 701; *Wilson v. Little*, 2 Comst. 443; *Story Bailm.* § 308; *Wadsworth v. Thompson*, 8 Ill. 423; *Stokes v. Frazier*, 72 Ill. 428.

⁶ *Pigot v. Cubley*, *supra*.

⁷ *Wheeler v. Newbould*, 16 N. Y. 392; *Strong v. Nat. Banking Assoc.*, 45 N. Y. 718; *Washburn v. Pond*, 2 Allen, 474; *White v. Rahway*, 16 Fed. R. 833; 3 Col. 551.

nor should the sale be carried out in an oppressive or underhand manner.¹ Even the sale, on default, of pledged stock or other incorporeal chattel at a broker's board has been held a private, and consequently an improper, sale.² But if the sale of the pledge be fairly made, on due notice and publicly, the pledgee is not blamable because of the low price it may fetch;³ the pledgee is not bound to wait for a better market;⁴ nor can the honest purchaser's title suffer for want of the pledgor's good will.⁵ A sale on the pledgor's default which has been fairly and openly conducted is not to be afterwards impeached.

Once more, where the pledgee himself purchases the chattel at the sale, or buys it in immediately after, by collusion with a sham purchaser, the sale is improper and leaves the pledgor free to avoid it, the practical effect being the same as though no sale at all had taken place, and the title stands as before.⁶ But the pledgor has it at his option to treat such a sale as valid.⁷

¹ *Ainsworth v. Bowen*, 9 Wis. 348; *Stevens v. Hurlbut Bank*, 31 Conn. 146.

² *Dykers v. Allen*, 7 Hill, 497; *Brass v. Worth*, 40 Barb. 648; *Wheeler v. Newbould*, 16 N. Y. 392; *Markham v. Jaudon*, 41 N. Y. 235. *Sed qu.* *Child v. Hugg*, 41 Cal. 519; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242.

³ *Ainsworth v. Bowen*, 9 Wis. 348.

⁴ *King v. Texas Banking Co.*, 58 Tex. 669; 133 Mass. 482.

⁵ *Lewis v. Mott*, 36 N. Y. 395; *Stokes v. Frazier*, 72 Ill. 428; *Newport Bridge Co. v. Douglass*, 12 Bush, 673; *Potter v. Thompson*, 10 R. I. 1.

⁶ *Pigot v. Cubley*, 15 C. B. n. s. 702; *Hope v. Lawrence*, 1 Hun, 317; *Ogden v. Lathrop*, 65 N. Y. 158; *Middlesex Bank v. Minot*, 4 Met. 25; *Bryan v. Baldwin*, 52 N. Y. 233; *Chicago Artesian Well Co. v. Corey*, 60 Ill. 73; *Stokes v. Frazier*, 72 Ill. 428; *Ainsworth v. Bowen*, 9 Wis. 348; *Baltimore Mar. Ins. Co. v. Dalrymple*, 25 Md. 269; *Bank of Old Dominion v. Dubuque R.*, 8 Iowa, 277; *Hestonville R. v. Shields*, 2 Brewst. 257. A subsequent purchase from the pledgee with notice of the facts leaves the effect of the improper sale as above. *Canfield v. Minneapolis Assoc.*, 14 Fed. R. 801.

⁷ *Hamilton v. State Bank*, 22 Iowa, 306. See *post*, as to the effect of special contract, etc.

§ 231. **The same Subject.** — Any sale on the part of the pledgee, in fact, before or after his pledgor's default, which is made without pursuing the legal formalities or respecting the pledgor's property rights, may be assumed wrongful. Yet, as we have elsewhere seen, the modern tendency is to go to the marrow of the pledge transaction: requiring the pledgor to pay or tender all he owes as a prerequisite to punishing, for the wrong itself, either the pledgee or an improper transferee of the pledge; and hence the courts refuse to award the pledgor damages, except for the possible surplus over and above making good that which the pledge was meant to secure.¹

The pledgor's bankruptcy, after putting the thing in pledge, will not impair the pledgee's right to make sale upon default;² and the failure and utter dissolution of a pledging partnership or company is held to justify the pledgee's informal sale, so far as the act of the pledgor for whose benefit the formality was required had rendered its strict pursuance impossible.³

§ 232. **Effect of Pledgor's Waiver of Defects; Ratification, etc.** — We shall presently see that the special contract of the parties and their mutual assent in advance may modify considerably these strict requirements of the law which attend a pledgee's sale on default. But more than this, any possible defects in the sale, as to notice or publicity, or even a purchase by the pledgee himself may be cured by subsequent conduct, on a pledgee's part, which amounts to a ratification on his part;⁴

¹ *Supra*, § 219; *Donald v. Suckling*, L. R. 1 Q. B. 585; *Halliday v. Holgate*, L. R. 3 Ex. 299; *Johnson v. Stear*, 15 C. B. N. S. 730; *Talty v. Freedman's Savings Co.*, 93 U. S. 321; *Bulkeley v. Welch*, 31 Conn. 339; *Davis v. Funk*, 39 Penn. St. 243; *Kidney v. Persons*, 41 Vt. 386; *Baltimore Mar. Ins. Co. v. Dalrymple*, 25 Md. 269.

² *Yeatman v. N. O. Savings Institution*, 95 U. S. 761; *Jerome v. McCarter*, 94 U. S. 734; *Halliday v. Holgate*, L. R. 3 Ex. 299; *supra*, § 222.

³ *City Bank of Racine v. Babcock*, 1 Holmes, 180.

⁴ *Child v. Hugg*, 41 Cal. 519; *Hamilton v. State Bank*, 22 Iowa, 306; *Clark v. Bouvain*, 20 La. Ann. 70; *Chouteau v. Allen*, 70 Mo. 290; *Fisher, ex parte*, 20 S. C. 179.

especially if the result has not been injurious to his interests. Lapse of time in connection with circumstances puts a bar of course to all claims which tend to disturb a title; and a pledgor may by his conduct ratify a sale of the pledge in a manner other than that prescribed by statute, as well as the common law, and thus cut off his right of redemption.¹

§ 233. **Peculiar Pledge Sales; Stocks on Margin.** — Our modern transactions in stocks and other kinds of incorporeal chattels give rise to a singular application of the foregoing rules for pledge sales. Thus, buying and selling stock through a broker on deposit of a "margin" with him — a speculating transaction in which the broker carries stock for his customers in his own name and with his own funds on the "margin" security — is held, in the State where such transactions are most common, to create the relation of pledgor and pledgee; so that, on the pledgee's failure to keep his margin good, the pledgor or broker cannot sell the stock, except upon the pledge formalities, for repayment of his advances and commissions; and this, notwithstanding a contrary usage among New York stock-brokers.² Other States have treated this transaction as a pledge, but not, in each instance, with the same rigorous exaction of sale formalities; deferring, perhaps, without assertion of public policy, to what might be called the special stipulations of the pledge parties themselves.³ In Massachusetts where a broker is ordered to buy stocks on margin, he is not allowed to assume the contract himself, and thus become virtually both buyer and seller.⁴

§ 234. **Sale of Pledged Stock.** — We may remark that the irregular sale of stock by a pledgee, or its misappropriation

¹ *Hill v. Finigan*, 62 Cal. 426; *Earle v. Grant*, 14 R. I. 228. And see *post* as to rights of redemption.

² *Markham v. Jaudon*, 41 N. Y. 235. *Grover and Woodruff, JJ.*, diss.; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325.

³ *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Baltimore Mar. Ins. Co. v. Dalrymple*, *ib.* 269; *Child v. Hugg*, 41 Cal. 519.

⁴ *Comm. v. Cooper*, 130 Mass. 285.

before or after his pledgor's default, does not, by the better opinion, fall under that rule of negotiable securities which permits the *bona fide* transferee for value to hold the thing against the original owner beyond a recoupment of the secured indebtedness.¹ If, however, the pledgee were carelessly held out to the public as the pledgor's agent, clothed by him with all the *indicia* of ownership for its full transfer, or as an owner, an apparent authority or ownership might, as concerned such a stranger, prove tantamount to a real authority or ownership in the premises.² And on this latter ground, as it would appear, the irregular or wrongful sale of stock by a pledgee has been sometimes upheld in favor of a *bona fide* transferee for value; or at least whatever consideration he gave is protected; a power of attorney to transfer having for convenience been delivered to the pledgee, together with the stock certificate.³ As to the pledgee of stock himself, however, no right can be maintained to sell or transfer it, save in compliance with contract and the general law of pledge;⁴ though, it is observable, the formalities which attend stock transfer are not in all States the same, nor even uniform as to shares in different companies.⁵

¹ *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325; *Ashton's Appeal*, 73 Penn. St. 153. Story Bailm. § 322, appears inaccurate on this point; and *Jarvis v. Rogers*, 13 Mass. 105, s. c. 15 Mass. 359, is not necessarily in contradiction of the text above. See *supra*, § 219.

² *Crocker v. Crocker*, 31 N. Y. 507; *Ogden v. Lathrop*, 65 N. Y. 158; *Thompson v. Toland*, 48 Cal. 99; *McNeil v. Tenth Nat. Bank*, *supra*. The New York doctrine is limited by *Merchants' Bank v. Livingston*, 74 N. Y. 223, so that one who is not understood to be more than the pledgor's agent, clothed with doubtful authority to transfer, cannot give the transferee a full *bona fide* title.

³ *Conyngham's Appeal*, 57 Penn. St. 474; *Prall v. Tilt*, 27 N. J. Eq. 393. Cf. *Merchants' Bank v. Livingston*, 74 N. Y. 223.

⁴ *Conyngham's Appeal*, 57 Penn. St. 474; *Wilson v. Little*, 2 Comst. 413; *Baltimore Mar. Ins. Co. v. Dalrymple*, 25 Md. 269; *Ogden v. Lathrop*, 65 N. Y. 158. Such is the rule, even though the pledgee be himself a shareholder in the company. *Fay v. Gray*, 124 Mass. 500.

⁵ 1 Schoul. Pers. Prop. § 495. In *Worthington v. Tormey*, 34 Md

The pledgee is not justified, according to the weightier authorities, in parting with such a security at his own pleasure; but, if he does so, his retransfer to the pledgor of a similar amount, when the bailment is accomplished, should oblige him likewise to account for the profits of his speculation.¹ Nor would a broker's usage, independently of the pledgor's permission, sustain so dangerous a privilege as that of restoring other similar shares and not the identical certificate.² But stock is a species of property valued chiefly for kind and quantity; and hence, where shares held in pledge are not easily distinguishable from others of the same description which the pledgee holds in a different capacity, courts disincline to award damages against the pledgee, as though the mixture were wrongful.³ Nor is the pledgee's right to recoup his pledgor's indebtedness to be lost sight of in any issue of stock conversion.⁴

§ 235. **Enforcement of Mortgage Security.** — Mortgage bonds or notes taken in pledge may require, on the pledgor's default, an enforcement of their special security; and the pledgee of such bonds or notes has no right to dispose of them at a loss to his pledgor, in order that strangers interested in wiping out the mortgage incumbrance may gain an advantage.⁵ So is it bad faith on the pledgee's part to make a pretended sale

182. notice of the place of the pledgee's sale of stock was deemed unnecessary.

¹ *Langton v. Waite*, L. R. 6 Eq. 165; *ib.* L. R. 4 Ch. 402; *Lawrence v. Maxwell*, 53 N. Y. 19; *Dykers v. Allen*, 7 Hill, 497; *Shaw v. Spencer*, 100 Mass. 382; *Fowles v. Ward*, 113 Mass. 548. But see *Thompson v. Toland*, 48 Cal. 99.

² *ib.*; *Oregon Co. v. Hilmers*, 20 Fed. R. 717.

³ *Berlin v. Eddy*, 33 Mo. 426; *Hayward v. Rogers*, 62 Cal. 348. That the pledgee is not obliged to sell stock at once upon default, see § 244, *post*.

⁴ *Supra*, § 219.

⁵ *Fletcher v. Dickinson*, 7 Allen, 23; *Newport Bridge Co. v. Douglass*, 12 Bush, 673. See *Burrows v. Bangs*, 34 Mich. 304.

of the mortgage note, at a sacrifice to the pledgor, so as to buy it back collusively for himself.¹

A deposit of title deeds as collateral security does not create such a lien on the land as can be foreclosed at law; but a bill in equity will lie to subject the land to the security.²

§ 236. **Enforcement of Negotiable Securities by Collection, etc.** — As regards negotiable securities like bills, notes, and coupon-bonds, two pledge peculiarities are noticeable: 1. Availability of title to a *bona fide* holder for value, when not overdue, even though lost, stolen, or otherwise put out of the original owner's control, without his fault or knowledge.³ 2. Application, in many instances, to a pledgee's satisfaction agreeably to the understood mutual intent, without any sale of the pledge whatever. On this latter point the rule deducible from a number of late decisions is, that the pledgee of negotiable securities not only has the right, but is bound, in the exercise of ordinary diligence, to make presentment or collection on their maturity, and then apply the proceeds on the pledge account;⁴ and if loss arises from a failure to do so upon reasonable knowledge and opportunity, the pledgee must bear the loss.⁵ And it has even been held wrongful for one to sell a negotiable note pledged to him, instead of collecting it; notwithstanding a contrary usage among brokers.⁶

¹ See *Richardson v. Mann*, 30 La. Ann. 1060; 20 Fed. R. 65.

² *English v. McElroy*, 62 Ga. 413; 20 Fed. R. 65. While an equitable mortgage is thus created as between individuals by the deposit of title deeds, the pledge of railroad or other corporate personal securities, though issued by way of mortgage bonds, gives a pledgee no such right to foreclose. *Carter v. Wake*, 4 Ch. D. 605.

³ 2 Schoul. Pers. Prop. §§ 20, 21; Story Bailm. §§ 322, 323.

⁴ *Supra*, § 206; *Wheeler v. Newbould*, 16 N. Y. 392; *Jones v. Hawkins*, 17 Ind. 550; *Reeves v. Plough*, 41 Ind. 204; *Lambertson v. Windom*, 12 Minn. 232; *Lazier v. Nevin*, 3 W. Va. 622.

⁵ *City Sav. Bank v. Hopson* (Conn.) 5 Atl. R. 601.

⁶ *Wheeler v. Newbould*, 16 N. Y. 392; *Markham v. Jaudon*, 41 N. Y. 235.

With the owner's assent the pledgee may sue upon such instruments in his own name;¹ or, indeed, without procuring such assent under the practice of many States, since his own rightful possession of the thing establishes his right.² An obliged party incurs the risk of having to pay over again, so far as the pledgee's secured right goes, if he settles with the pledgor who has put the note in pledge out of his own hands.³ Whatever the pledgee may thus collect, be it in whole or in part, goes to the account of the pledge; and the surplus remaining after full satisfaction of his secured debt or engagement, and incidental expenses, he must render to his pledgor.⁴ The pledgee's transfer or retention of a negotiable security which he might have collected may render him chargeable with its full amount, as though he had elected to take it in payment of his secured indebtedness;⁵ and this to the extent of releasing the pledgor from any contingent liability as indorser.⁶

Where a negotiable security contains on its face a memorandum that it is to be used as collateral security, the party sued upon it may show its true consideration, and the identity, nature, and amount of the demands for which it was collateral.⁷ But, under ordinary circumstances, the holder of a note as collateral is not chargeable with its wrongful conversion by refusing to deliver it up until the person claiming it pays, or offers to pay, the full amount for which it is

¹ *Lobdell v. Merchants' Bank*, 33 Mich. 408.

² *Houser v. Houser*, 43 Ga. 415; *Hilton v. Waring*, 7 Wis. 492; *Louisiana State Bank v. Gaiennie*, 21 La. Ann. 555; *White v. Phelps*, 14 Minn. 27.

³ *Mayo v. Moore*, 28 Ill. 428; *Valette v. Mason*, 1 Ind. 288; *Dix v. Tully*, 14 La. Ann. 456.

⁴ *Hilton v. Waring*, 7 Wis. 492; *Overstreet v. Nunn*, 36 Ala. 666; *Houser v. Houser*, 43 Ga. 415; *Rice v. Benedict*, 19 Mich. 132; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Rohrle v. Stidger*, 50 Cal. 207.

⁵ See *Cocke v. Chaney*, 14 Ala. 65; *Powell v. Henry*, 27 Ala. 612.

⁶ *Whitten v. Wright*, 31 Mich. 92.

⁷ *Garton v. Union City Nat. Bank*, 34 Mich. 279.

held.¹ An accommodation note, which is without consideration as between the original parties, is yet in the hands of a pledgee who took it without notice thereof available to the extent of the intended security or consideration;² while this and no more is by the better rule all the *bona fide* holder for notice can recover, where the maker of the note has a good defence against the pledgor.³

§ 237. **The same Subject.**—But, though the pledgee of negotiable securities may thus sue and recover upon them, he cannot, in general, compromise with the parties bound thereon, and so surrender the security, without becoming liable to account to the pledgor for its full amount.⁴ Much less can he make a careless or faithless settlement against his pledgor's interest.⁵ Yet, if the compromise were reasonable and just, and not, as a pledgee is tempted to make it, so as to sacrifice the pledgor for the pledgee's own sake, it ought, seemingly, to stand; for, as we have seen, ordinary care and diligence is the standard by which the pledgee's responsibility for realizing upon such securities is measured.⁶

Quite commonly does the taking of short commercial paper in pledge practically involve rather its renewal on maturity, or the substitution of other security, than making a cash collection. Such exchange or renewal of securities would

¹ *Benior v. Paquin*, 40 Vt. 199.

² *Fisher v. Fisher*, 98 Mass. 303; *Louisiana State Bank v. Gaiennie*, 21 La. Ann. 555. And see *Mechanics' Bank v. Barnett*, 27 La. Ann. 177; *Gardner v. Maxwell*, 27 La. Ann. 561; *Union Nat. Bank v. Roberts*, 45 Wis. 373. It is held in *Goldsmidt v. Church Trustees*, 25 Minn. 202, that where promissory notes are sold, a purchaser from the pledgee, with notice that the notes are merely held in pledge, cannot claim the full right of *bona fide* holder for value against the equities of the pledgor.

³ 90 N. Y. 483; *Union Nat. Bank v. Roberts*, *supra*.

⁴ *Garlick v. James*, 12 Johns. 146; 98 Ill. 613; *Depuy v. Clark*, 12 Ind. 427; *Story Bailm.* § 321. See *Thayer v. Putnam*, 12 Met. 297.

⁵ *Union Trust Co. v. Rigdon*, 93 Ill. 458.

⁶ *Supra*, § 206. And see 9 Lea, 63. The pledgee ought, if possible, to consult the pledgor upon such a point.

most safely be performed by pledgor and pledgee acting in concert; yet the sole discretion of the latter in such matters, where the pledge contract lays him under no special restraint, has been strongly asserted in some cases; provided, however, at all times, that the pledgee exercise therein ordinary diligence and prudence.¹

§ 238. **The same Subject.** — The reason of the rule which requires the pledgee to collect, and not sell, negotiable securities, appears simply to be that the sale of commercial paper which will mature in the pledgee's keeping is not, presumably, intended under the pledge contract, but rather its collection or renewal on the pledge account; inasmuch as collection by the pledgor himself on the one hand is not feasible while he is out of possession, and on the other, the pledgee, by selling securities so soon to mature, would annoy and perhaps cause loss to the pledgor and the security parties, and by holding them without presentment and then selling them when overdue, would be sure to occasion damage; besides which is the circumstance that such security is to mature sooner than the principal undertaking. But the length of time for which the security is to run, as compared with the principal, is of vital bearing upon the issue of mutual intent, as well as of mutual convenience. Hence, the propriety of confining this rule to securities which will mature before or about the same time that the bailment properly terminates, so far as any presumed obligation on the pledgee's part is concerned. For, in the case of coupon-bonds not presently redeemable,² long commercial paper, and, in general, such pledged bonds and negotiable instruments as are not expected to mature till considerably later than the secured undertaking is fully performed, a power in the pledgee to sell on default with the usual formalities may well be presumed,

¹ Girard Fire Ins. Co. v. Marr, 46 Penn. St. 504.

² Morris Canal Co. v. Lewis, 1 Beasl. 323; Water Power Co. v. Brown, 23 Kan. 676.

rather than an obligation on his part to make presentment and collection, and delay his pledge remedies.¹ But if a pledgee elect to wait until the security matures, his pledgor continuing, meantime, in default, this is a different matter.² There is authority, too, for holding that, on due presentment and dishonor of short paper given as security, and the pledgor's default on the main engagement, the pledgee has a right to sell the overdue paper publicly upon notice, instead of suing upon it.³

§ 239. **Enforcement of Debts, Claims, etc., as Security.**—When mere debts, claims, or money rights are received in pledge, or paper already overdue, it may or may not, according to the circumstances and the apparent intent of the parties, be the pledgee's duty to diligently attempt their collection, instead of waiting to sell;⁴ but, for any amount thus collected, he is certainly accountable as under the pledge.⁵

§ 240. **Every Security to be enforced according to its Nature and the Mutual Intent.**—Whatever be the nature of the security, in fine, the pledge contract carries the implication that it shall be put reasonably towards discharging the pledge obligation, in accordance with mutual intent and the good sense of the transaction. And, if the main object be to indemnify instead of discharging an indebtedness, the happening of what was provided against, or breach of the pledgor's

¹ *Richards v. Davis*, 5 Penn. L. J. 471; *Overlock v. Hills*, 8 Me. 383; *Alexandria R. v. Burke*, 22 Gratt. 254. The decision in *Fraker v. Reeve*, 36 Wis. 85, is best justified, upon such a distinction from *Wheeler v. Newbould*, 16 N. Y. 392.

² See *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

³ *Potter v. Thompson*, 10 R. I. 1, 8, 10.

Where promissory notes are properly sold instead of collected, the sale should be with the usual formalities. *Goldsmidt v. Church Trustees*, 25 Minn. 202.

⁴ *Mullen v. Morris*, 2 Penn. St. 85; *Rice v. Benedict*, 19 Mich. 132.

⁵ *Rice v. Benedict*, 19 Mich. 132; *Kittera's Estate*, 17 Penn. St. 146. See *supra*, §§ 206–208.

engagement, constitutes the default upon which resort to the security is justifiable.¹ Increments of the pledge retained by the pledgee may be sold, as well as the original pledge itself.² And in the conduct of a sale once undertaken upon the pledgor's default, as well as in collecting the security, good faith and ordinary diligence should be exercised.³

§ 241. **Rules of Priority ; Application of Proceeds, etc.**—In adjusting the rights of various lien-creditors to the fund derived from the sale of a pledge on default, or its reduction to cash, the usual rules of priority are to be observed ; though such doctrines, in the present connection, receive but slight attention from our courts.⁴ If the proceeds be insufficient for discharging the whole debt secured, fully indemnifying the pledgee under his pledge contract, the deficit should constitute a personal charge against the pledgor, recoverable against him.⁵ But if, on the other hand, the pledgee obtain entire satisfaction, and there should remain a surplus, this (saving the claims of a paramount owner) belongs to the pledgor, or to subsequent lien-parties in his right, and the pledgee must account accordingly.⁶

¹ *Vest v. Green*, 3 Mo. 219 ; *Post v. Tradesmen's Bank*, 28 Conn. 420.

² *Story Bailm.* § 314.

As to the formalities in enforcing the security of a savings-bank book, delivered under peculiar circumstances, see *Boynton v. Payrow*, 67 Me. 587. For the case of a bond and certificates given to secure purchase-money due on shares of stock of a land company, see *Merchants' Bank v. Thompson*, 133 Mass. 482. City scrip or orders should be collected and not sold. 16 W. Va. 717.

³ See *McQueen's Appeal*, 104 Penn. St. 595 ; *Colquitt v. Stultz*, 65 Ga. 305.

⁴ *Story Bailm.* § 312 ; 1 *Domat*, 3, 1 ; *Newport Bridge Co. v. Douglass*, 12 Bush, 673.

⁵ *Story Bailm.* § 314 ; *Faulkner v. Hill*, 104 Mass. 188 ; *Stokes v. Frazier*, 72 Ill. 428.

⁶ *Story Bailm.* § 314 ; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155 ; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540 ; *Rohrle v. Stidger*, 50 Cal. 207 ; *Jesup v. City Bank*, 14 Wis. 331. For a sale of the pledge under an arrangement with the pledgee's assignee in bankruptcy, see 126 Mass. 209.

Wherever the thing was pledged to the same party for two or more debts or engagements, and the pledge, when sold, will not suffice to liquidate the whole, the proceeds of the sale are naturally applied proportionally to all the debts, so as to extinguish them *pro tanto*, unless the pledgee would thereby suffer special damage.¹ But the law leaves appropriation of payments largely to a creditor's own choice; and hence, where a pledgee who holds security for various notes is bound to no express arrangement in this respect, he may, on his pledgor's default, apply the proceeds of the security towards the notes in the manner most convenient for himself, even though some of the notes have solvent sureties or indorsers to them, and some have not.² Where the security, first given for a specific debt, is afterwards extended to all the pledgor's indebtedness to the pledgee, the latter has been allowed to apply the sale proceeds, when insufficient for liquidating the pledgor's entire indebtedness to him, to the specific debt first of all, with the balance *pro rata* towards his general demands.³

It is held that when a creditor, having two demands against his debtor, one of which is specially secured while a pledge is given for the security of the whole, sells the pledge, on default, for enough to pay both demands, it will be a satisfaction of both.⁴

§ 242. **Various Securities; how applied.**—Where, again, several things are pledged for the same principal undertaking, each, by the civil as well as the common law, will be deemed liable for the whole debt or engagement; and the pledgee may, on his pledgor's default, proceed to sell them from time to time till fully satisfied.⁵ Here, too, the pledgee

¹ Story Bailm. § 312; *Blackstone Bank v. Hill*, 10 Pick. 129; *Beach v. State Bank*, 2 Ind. 488.

² *Wilcox v. Fairhaven Bank*, 7 Allen, 270.

³ *Eichelberger v. Murdock*, 10 Md. 373.

⁴ *Strong v. Wooster*, 6 Vt. 536.

⁵ Story Bailm. § 314; *Pothier de Nantissement*, n. 43; *Vest v. Green*,

has much freedom of choice; for he is not obliged to pursue all together, nor one security rather than another;¹ nor can he be compelled to give up any one until the pledge obligation is fully discharged.² One may have the benefit of all collateral obligations, given in security, whether by way of pledge or mortgage.³ But though there be many securities, the pledgee can obtain but one satisfaction; and he ought not to force an excessive sale of separable securities, such as scrip or coupon-bonds, when the sale of a portion will amply suffice,⁴ nor having realized enough upon his security proceed to sue the pledgor.⁵

In general, if the amount recovered on the security be greater than the pledgor owed, the pledgee recovers the excess for the pledgor's use.⁶

§ 243. **Right of Third Party who discharges to the Securities.** — While, however, the pledgee is under no obligation to relinquish any part of his security until the principal object for which he took it has been fully accomplished, it is a well-settled rule of equity that the security of a debt or engagement, in whosoever hands it may be, is a fund held in trust for the ultimate discharge of that debt or engagement in favor of all parties concerned.⁷ Hence any third party, such as an indorser or surety who was bound for the pledgor's performance, may, upon discharging, voluntarily or by

3 Mo. 219; *Union Bank v. Laird*, 2 Wheat. 390; *Cullum v. Emanuel*, 1 Ala. 23. But the taking of several securities might be for several specific debts. See *Baldwin v. Bradley*, 69 Ill. 32; *Phillips v. Thompson*, 2 Johns. Ch. 418.

¹ *Comstock v. Smith*, 23 Me. 202; *Brick v. Freehold, &c. Co.*, 37 N. J. L. 307; *Buchanan v. International Bank*, 78 Ill. 500.

² *Union Bank v. Laird*, 2 Wheat. 390.

³ *Heid v. Vreeland*, 30 N. J. Eq. 591.

⁴ *Fitzgerald v. Blocher*, 32 Ark. 742.

⁵ See *Rea v. Forrest*, 88 Ill. 275.

⁶ *Union Bank v. Roberts*, 45 Wis. 373.

⁷ *Church, J.*, in *New London Bank v. Lee*, 11 Conn. 112; *Merrick, J.*, in *Wilcox v. Fairhaven Bank*, 7 Allen, 270, 272.

compulsion, the pledge obligation, demand the collaterals of the pledgee, and obtain full satisfaction for himself or a just contribution from the other sureties, as justice may require.¹

§ 244. **Pledgee not bound to sell on Default.** — But a pledgee, we now observe, is not in general bound, on his pledgor's default, to sell the thing pledged; ² while, on the other hand, the pledge will not become his absolute property where he fails to do so.³ His omission to enforce his right under the security simply leaves the thing a mere pledge as before; and under these circumstances the pledgee will remain bound to restore it to the pledgor whenever full payment or satisfaction of the secured undertaking has been made or tendered him, subject, of course, to the doctrine of limitations.⁴ But since he is not bound to sell, neither will he be held liable, while his pledgor remains inert, for the mere depreciation of the unsold pledge on his hands.⁵

Is, then, the unfortunate pledgor who cannot help defaulting compelled to see valuable securities sink into worthlessness, through his pledgee's inaction, which might have gone towards extinguishing the main indebtedness? Not utterly, unless justice slumbers; but where the interests of the pledgor, or perhaps of general creditors, demand it, equity will entertain a bill to compel a sale of the pledged property

¹ *Ib.*; *Brick v. Freehold, &c. Co.*, 37 N. J. L. 307; *Stewart v. Davis*, 18 Ind. 74; *Strong v. Wooster*, 6 Vt. 536; *Goss v. Emerson*, 3 Fost. 38; *Mitchell v. Bass*, 24 Tex. 392.

² *Badlam v. Tucker*, 1 Pick. 400. And see 35 La. Ann. 520.

³ *Story Bailm.* §§ 320, 321, 346.

⁴ See *post*, as to the pledgor's right of redemption.

⁵ *Smith v. Strout*, 63 Me. 205; *Granite Bank v. Richardson*, 7 Met. 407; *Williamson v. McClure*, 37 Penn. St. 402; *Richards v. Davis*, 5 Penn. L. J. 471; *Richardson v. Ins. Co.*, 27 Gratt. 749; *Robinson v. Hurley*, 11 Iowa, 410; *Rozet v. McClellan*, 48 Ill. 345; *Wood v. Morgan*, 5 Sneed, 79; *Bank of Rutland v. Woodruff*, 31 Vt. 89. The above rule is frequently asserted of stock, and the like chattels of fluctuating market values. And see *O'Neil v. Whigham*, 87 Penn. St. 394.

and a due application of its proceeds.¹ Even his notice to the pledgor to sell or realize, upon a fit emergency, may put the risks of inaction upon his pledgee; for what we mainly observe is that the pledgor must not remain inactive, but must keep on the alert for the interest of the pledged property, taking the initiative unless his pledgee was clearly bound to do so. Furthermore, as the reason of the situation requires, the pledgee who continues thus in possession after default is not absolved from the exercise of at least a gratuitous bailee's diligence; and if it would be culpable negligence to proceed to expose pledged furniture to rough weather, why should he not be held for a like insensibility in carelessly suffering pledged securities to become utterly worthless on his hands when he might well have realized upon them? If a pledged note or bond should mature long after the pledgor's default, or stock be called in to wind up a company, it would seem to be incumbent upon him, a possessor at that late day, to take ordinary precautions for its collection.² We have seen that a pledgee may be bound to collect with ordinary diligence, from the very nature of the transaction.³ And in general if by the fault of the pledgee collaterals deteriorate or become worthless he should bear the loss.

§ 245. **The same Subject.**—To apply our principles in the light of late precedents. If the creditor takes promissory notes having a short time to run, outstanding debts or claims, judgments, or other like security, whose enforcement, it may be said, was to consist in collecting and applying the proceeds to his claim, his inertness or want of ordinary diligence in realizing as was intended, renders him accountable for the

¹ Story Bailm. § 320; *Kemp v. Westbrook*, 1 Ves. Sen. 278; 2 Story Eq. Jur. §§ 1031–1033. The civil law, which is followed in Louisiana, recognized the right of compelling the pledgee to sell for the benefit of others interested in subordination to his own claim. *Williams v. Schooner St. Stephens*, 14 Mart. 22.

² See *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

³ *Supra*, § 236.

loss and may be offset to his claim against the pledgor.¹ But where stock is held by way of pledge the pledgee is not bound to sell the stock on default without at least notice from the pledgor directing him to do so, or facts indicating a necessity.² But where the pledgee delays selling the stock in bad faith, and in pursuance of some conspiracy to depreciate the stock for personal advantage, he violates his bailment duty.³ And if the pledgee undertakes to sell or becomes charged with the duty of selling, the sale should be fairly conducted and with ordinary diligence.⁴

§ 246. **Pledgee may sue the Pledgor on Default.**—3. This brings us to the pledgee's third remedy upon his pledgor's default; viz., to sue the pledgor personally on the debt or engagement. This he may always do without selling the thing pledged, since the mere taking of security imports no promise to pursue the security first;⁵ and he may even attach the pledged property in his suit.⁶ Recovery of judgment on the principal debt or engagement, though followed by an arrest of the pledgor's person, will not preclude the pledgee from continuing to hold the collaterals until that full satisfaction is obtained to which the pledge contract entitled him;⁷

¹ *Simple Man. Co. v. Detwiler*, 30 Kan. 386; *supra*, § 236; *Harper v. Second Bank*, 12 Lea, 678; 65 Ga. 305; *Douglass v. Mundine*, 57 Tex. 344.

² *O'Neill v. Whigham*, 87 Penn. St. 394; *Colquitt v. Stultz*, 65 Ga. 305; *Newsom v. Davis*, 133 Mass. 343.

Some cases even deny the pledgor's right to force such a sale at pleasure. *Napier v. Central Georgia Bank*, 68 Ga. 637.

³ *Napier v. Central Georgia Bank*, 68 Ga. 637.

⁴ See *McQueen's Appeal*, 104 Penn. St. 595.

⁵ 2 Kent Com. 582; *South Sea Co. v. Duncomb*, 2 Str. 919; *Elder v. Rouse*, 15 Wend. 218; *Story Bailm.* § 315; *Dugan v. Sprague*, 2 Ind. 600; *Bank of Rutland v. Woodruff*, 34 Vt. 89; *West v. Carolina Life Ins. Co.*, 31 Ark. 476. And see statute construed in *United States v. New Orleans*, 98 U. S. 381.

⁶ *Whitwell v. Brigham*, 19 Pick. 117; *Buck v. Ingersoll*, 11 Met. 226; *Arendale v. Morgan*, 5 Sneed, 703.

⁷ *Smith v. Strout*, 63 Me. 205; *Fisher v. Fisher*, 98 Mass. 303; *Charles v. Coker*, 2 S. C. 122.

and even his bare promise to give them up, under such circumstances, is a promise without consideration, and of no binding force.¹

Nor, in general, would recovery of judgment against the pledgor, whether upon the security or the principal debt, discharge the pledge; for actual satisfaction is what the law ultimately seeks on behalf of a pledgee.² And judgment, by confession or otherwise, may thus operate, by fair intendment, as additional or cumulative security.³ But the pledgor who pays the amount of judgment into court is entitled to a stay of execution until the pledge is returned or properly accounted for;⁴ and where, after suit brought, the pledgee sells collateral security for enough to make good what was owing, this discharges his cause of action.⁵

§ 247. **The same Subject.** — A pledgee may, however, actually relinquish to his pledgor collateral security, without impairing his right to proceed against him personally or upon different security still left in his hands; and other creditors, not in privity with the pledge parties, have no cause to complain of any such arrangement on their part.⁶ So it is a general principle, which our bankrupt and insolvent laws recognize, that the just balance due a pledgee over and above his securities, may be judicially pursued like the claim of an ordinary creditor.⁷

Wherever suit is brought to recover the demand for which the pledge was given, the pledgee ought to be prepared either to restore the pledge on satisfaction, or to account fairly as bailee for its non-production.⁸

¹ *Smith v. Strout*, *supra*. ² *Ib.*; *Fisher v. Fisher*, 98 Mass. 303.

³ *Charles v. Coker*, 2 S. C. 122.

⁴ *Semple Man. Co. v. Detwiler*, 30 Kan. 386.

⁵ See *Lewis v. Jewett*, 51 Vt. 378.

⁶ *Dyott's Estate*, *in re*, 2 W. & S. 463.

⁷ *Story Bailm.* § 314; *Faulkner v. Hill*, 104 Mass. 188; U. S. Bankruptcy Act of 1867, §§ 20, 21.

⁸ *Stuart v. Bigler*, 98 Penn. St. 80. Where the pledgee sues on his

§ 248. **Remedies on Default regulated by Statute or Special Contract.** — This whole subject of remedies on the pledgor's default may be found specially regulated: (1) by local legislation; (2) by express stipulations of the parties themselves. As instances of the former kind may be mentioned the statutes of certain States which prescribe a specific method of conducting the non-judicial sale in various particulars, as in the formalities of notice, or the proper interval which should elapse between serving the notice and selling, — not, perhaps, to the exclusion of other lawful methods;¹ and the salutary provision frequently found, that the holder of collateral security shall exhaust or surrender it before he can sue on the original indebtedness.² And with respect to instances of the latter kind, it is undoubtedly true (saving the rights of those in privity with them) that, by suitable contract the parties may expressly regulate the general terms of bailment, and method of pursuing remedies by the one party on default of the other. Thus has the power to sell been expressly conferred;³ the time and manner of such sale fixed,⁴ and even the right conferred on the pledgee to sell upon default without any notice, or at a private sale,⁵ or with clear permission to be himself a purchaser.⁶ It is possible, too, that, by virtue of some special provision to that effect, the pledgee might be empowered to take absolute ownership of the pledged chattel at a fixed valuation, such valuation being fair to both, and

demand the pledgor may counterclaim a culpable loss or conversion of the pledge. *Cutting v. Marlor*, 78 N. Y. 454.

¹ Mass. Gen. Sts. c 151, §§ 9-11; 62 Cal. 426.

² See *Swift v. Fletcher*, 6 Minn. 550.

³ *Wilson v. Little* 2 Comst. 443; *Story Bailm.* § 317.

⁴ *Robinson v. Hurley*, 11 Iowa, 410; *Rohrle v. Stidger*, 50 Cal. 207; *City Bank v. Babcock*, 1 Holmes, 181.

⁵ *Genet v. Howland*, 45 Barb. 560; *Maryland Fire Ins. Co. v. Dalrymple*, 25 Md. 242; *Loomis v. Stave*, 72 Ill. 623; *Mowry v. Wood*, 12 Wis. 413.

⁶ *Chouteau v. Allen*, 70 Mo. 290; *Hamilton v. State Bank*, 22 Iowa, 306.

the provision a reasonable one.¹ That ratification or mutual assent after default may vary the bailment terms we have already seen.²

§ 249. **Oppressive Stipulations violate Public Policy.** — But stipulations between pledge parties are not to be upheld, if, as too frequently happens, they are unconscionable and oppressive to the debtor; as, for instance, where they contract that, unless the pledgor fulfil his principal undertaking at the appointed time, the pledgee shall hold the pledge as absolutely his own.³ The pledgor's rights are not to be sacrificed upon vague and doubtful terms of expression.⁴ Nor, on the other hand, should express terms be taken to defeat the rational purpose of securing the creditor, and permitting the security to be enforced on default; so that a stipulation literally purporting that the pledgor may determine when the thing pledged shall be sold, ought not to be construed so as to confer upon him the right, when in default, to defeat the pledgee's remedies upon the security.⁵ All bailment stipulations are limited by public policy and good sense.

The law of Rome treated special stipulations between pledgor and pledgee with like reservations; and the modern codes of continental Europe exhibit a corresponding disposition.⁶ True, by the ancient *lex commissoria*, the debtor and creditor might agree that, if the former did not pay what he owed by the day fixed, the pledge should become the absolute property of the pledgee; but this privilege was found to work so harshly that Constantine abolished it.⁷ While recognizing

¹ See Story Bailm. § 345.

² *Supra*, § 232.

³ *Locketts v. Townsend*, 3 Tex. 119; *Dorrill v. Eaton*, 35 Mich. 302.

⁴ *Goldsmidt v. Church Trustees*, 25 Minn. 202. But the pledgee may be specially empowered to realize on default by sale or collection. *Ib.*

⁵ *Belden v. Perkins*, 78 Ill. 449. And see *King v. Texas Co.*, 58 Tex. 669.

⁶ Story Bailm. §§ 309, 318, 319, 345.

⁷ 2 Kent Com. 583; Pothier Contrat de Nantissement, n. 18.

a pledgee's right to sell on default of the pledgor, by special contract arrangement, the Roman law for ordinary cases showed in Justinian's time excessive solicitude for the pledgor, since it required the pledgee to give two years' notice, before he could sell the pledge.¹

§ 250. **Pledgor's Right of Redemption.** — Now, as concerns the pledgor's right of redemption. Where the pledge has once been disposed of on the pledgor's default, either under some decree in chancery or by a non-judicial sale regularly conducted, the same being in full compliance with law and the just and rational contract of the parties, the pledgor's right of redemption is utterly gone.² So is it in the case of pledged incorporeals, such as negotiable paper or money claims, which the pledgee has rightfully collected.³ But otherwise, — as if the pledgee refrain from selling or collecting, or sell irregularly, or buy in the thing for himself where he has no special permission to do so, or make a wrongful transfer of it to some third party whom the pledgor is not legally debarred from pursuing, — the pledgor's right of redemption will continue, notwithstanding his own delinquency.

It is said that where no time was limited for redemption of the pledge, the pledgor has his own lifetime to redeem, unless quickened by a notice *in pais*, or through the intervention of a court of equity; consistently with which rule the pledgee's death would afford him no hindrance.⁴ But modern prescription runs rather by lapse of years than the uncertain span of a human life; and while, supposing the lapse of no unreasonable period from the pledgor's default, nor a waiver

¹ 2 Kent Com. 582, 583; Code, 8, 34, 3, 1.

² *Supra*, § 227.

³ *Supra*, §§ 236-239.

⁴ 2 Kent Com 582; Story Bailm. §§ 345-348, 362; *Kemp v. Westbrook*, 1 Ves Sen. 278; Prec. Ch. 420; *Ratcliff v. Davis*, 1 Bulst. 29; Bac. Abr. Bailment, B.; *Cortelyou v. Lansing*, 2 Cain. Cas. in Err. 200; *Perry v. Craig*, 3 Mo. 516; *Jones v. Thurmond*, 5 Tex. 318.

of redemption, the right to redeem may pass to the representatives of a deceased pledgor, time puts an absolute barrier to the pursuit of all such remedies, irrespective of the living or dead. Strictly speaking, the Statute of Limitations does not run against a pledge;¹ but, inasmuch as it runs against the pledgee's enforcement of the secured debt or engagement, so will equity decline to entertain the pledgor's bill for redemption if he or his representatives bring it unreasonably late; for the property will then be conclusively presumed to have vested in the pledgee, or, at least, duly disposed of.² The pledge having been made and possession kept, the pledgor cannot, though limitation has run against the debt, recover possession in any event without payment or tender of the debt.³

Where, however, the pledgor's object is rather to compel the account of a certain surplus received from the sale or collection of the pledge than to make profit from an unexpected rise in the value of securities once presumably relinquished to the pledgee, and duly disposed of, equity regards his bill with much more favor, notwithstanding a long delay in bringing it.⁴ And, in general, should an incorporeal col-

¹ *Ib.*

² What shall be the limitation of the pledgor's right of redemption appears largely a matter of judicial discretion. The pledgor can claim, doubtless, the full period during which a pledgee is permitted to sue on the secured debt or engagement, which is, in general, six years. *Whelan v. Kinsley*, 26 Ohio St. 131. A period longer or shorter is in some States prescribed by statute. See U. S. Dig. 1st series, Bailment, 370. In *White Mountains R. v. Bay State Iron Co.*, 50 N. H. 57, the pledgors of bonds secured by mortgage were allowed to redeem the bonds after the lapse of fifteen years, although the pledgee had meanwhile foreclosed the mortgage. And see *Hancock v. Franklin Ins. Co.*, 114 Mass. 155. But in *Waterman v. Brown*, 31 Penn. St. 161, the pledgor of certain bank stock was not allowed to redeem after six years from the maturity of the note it was given to secure. See *Lockwood v. Brantly* (N. Y.), 9 N. E. 37; *Fennell v. McGowan*, 58 Miss. 261.

³ *Hudson v. Wilkinson*, 61 Tex. 606.

⁴ See *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *White Mountains R. v. Bay State Iron Co.*, 50 N. H. 57.

lateral fall due long after the pledgee's right to sue the principal debt has become outlawed, and the pledgee make collection thereof, the Statute of Limitations may be said to run against the overplus above his own secured claim, from the time of such collection.¹

§ 251. **The same Subject.** — A pledgor may doubtless waive his right of redemption by expressly consenting, upon default, that the pledgee shall sell the pledged chattels, satisfy himself out of the proceeds to the extent the pledge contract provided, and account for the balance to the pledgor.²

§ 252. **Pledgor's General Right to Pledge on Fulfilment of Secured Undertaking.** — But, to speak more generally of a pledgor's rights on maturity of the principal engagement, he is entitled to a restoration of the pledged property, or (if left for collection) of its proceeds, whenever he has, voluntarily or on compulsion, fulfilled the secured engagement, or made payment or tender of all that was due from him under the bailment;³ provided, of course, he has not previously debarred himself from pursuing the pledge on any of the grounds already considered. For the rule is, that a pledge ceases to be operative when its object is effected, and the whole beneficial interest in the security pledged then vests absolutely in the equitable owner.⁴ In other words, the alternative which obliges the bailee to redeliver has now arrived.

§ 253. **The same Subject; Tender of what was due, etc.** — As to sufficiency of tender, the usual rules here apply. A tender of whatever is due on the appointed day, or any other rightful tender, will put an end to the pledge relation, and render the pledgee's longer detention of the thing inexcusable,

¹ See *Hancock v. Franklin Ins. Co.*, 114 Mass. 155.

² *Ib.*; *Stevens v. Bell*, 6 Mass. 339, per Parsons, C. J.; *supra*, § 248.

³ *Blackwood v. Brown*, 34 Mich. 4; cases *infra*.

⁴ *Ward v. Ward*, 37 Mich. 253; *Stuart v. Bigler*, 98 Penn. St. 80; 131 Mass. 14.

and his refusal or unreasonable delay to give it up on demand tantamount to conversion.¹ The pledgee's sale for non-compliance with conditions which he had no right to superadd, or after the pledgor has made satisfaction or tender of all that was rightfully due under the pledge contract, is certainly tortious.²

But the pledgee's bare offer to redeem, unaccompanied by the tender of what he owes, will not suffice;³ nor will any partial tender.⁴ Where the pledgee has not dealt wrongfully with the thing, and especially if his rights have become jeopardized by the pledgor's own default, courts disincline to construe into a technical refusal on his part mere wavering or dilatory conduct when tender is made him; and time, in such cases, ought to be allowed for computing the items payable on a long or difficult open account.⁵ A surety or indorser holding property for his indemnity may, upon demand, require a like reasonable opportunity to learn his status; and so in a pledge of which some third party was permitted to keep the actual custody.⁶ But it is otherwise where no rational cause for delay exists, and the pledgee appears inclined to evade his legal duty.⁷

As for methods of tender, the pledgor is protected against wrong and oppression. Thus, the tender of a larger amount than what was owing, for the sake of preventing litigation, will not readily be construed into an admission of liability to that amount.⁸ And if the tender were made too soon, the

¹ *M'Lean v. Walker*, 10 Johns. 471; *Lawrence v. Maxwell*, 53 N. Y. 19; *Doak v. Bank of State*, 6 Ire. 309; *McCalla v. Clark*, 55 Ga. 53; *Geron v. Geron*, 15 Ala. 558; *Mayo v. Avery*, 18 Cal. 309; *Mitchell v. Roberts*, 17 Fed. R. 776.

² *Pigot v. Cubley*, 15 C. B. N. s. 702; *Hope v. Lawrence*, 1 Hun, 317.

³ *Potter v. Thompson*, 10 R. I. 1.

⁴ See *Kittera's Estate*, 17 Penn. St. 416.

⁵ *Dunham v. Jackson*, 6 Wend. 22; *McCalla v. Clark*, 55 Ga. 53.

⁶ See *Dewart v. Masser*, 40 Penn. St. 302.

⁷ *Fisher v. Brown*, 104 Mass. 259.

⁸ *Talmage v. New York Bank*, 91 N. Y. 531.

pledgee may be deemed to have waived that objection unless he asserted it.¹

§ 254. **The same Subject; Suit for Repossession.**— Upon full satisfaction of the secured indebtedness, or the tender thereof, besides a demand for the pledge, followed by the pledgee's refusal to redeliver, the pledgor may sue for the thing pledged in trover, or perhaps replevin.² He may recover the pledge or its value without keeping the tender good or bringing the money into court, and so put the pledgee to his own remedies.³ And, if he once gets repossession of the thing under such circumstances, he has good cause for maintaining it.⁴ Where, plainly, nothing more was owing on the pledgor's part, while the pledgee had wrongfully misappropriated the thing, demand might be dispensed with as useless; and, indeed, upon the pledgee's wrongful transfer or conversion of the pledge, the pledgor has been sometimes permitted to sue without even tendering what he owes.⁵ But, as we have elsewhere seen, the bailee in pledge is now favorably viewed by the law to the extent of a secured demand still subsisting; so that, in order to avoid circuitry of action, he or his transferee may generally recoup such demand against the pledgor's claim of damages as for conversion.⁶ And, generally speaking, where no wrongful transfer

¹ Wyckoff v. Anthony, 90 N. Y. 442, where the tender was made on the day when the note became due, without waiting for days of grace to expire; and whether this was too early, *quere*.

² M'Lean v. Walker, 10 Johns. 471; Fisher v. Brown, 104 Mass. 259.

³ Mitchell v. Roberts, 17 Fed. R. 776.

⁴ Geron v. Geron, 15 Ala. 558.

⁵ Story Bailm. § 349; Cortelyou v. Lansing, 2 Cain. Cas. in Err. 200; Stearns v. Marsh, 4 Denio, 227; Lucketts v. Townsend, 3 Tex. 119.

⁶ *Supra*, § 219; Donald v. Suckling, L. R. 1 Q. B. 585; Johnson v. Stear, 15 C. B. N. s. 730; Halliday v. Holgate, L. R. 3 Ex. 279; Talty v. Freedman's Savings Co., 93 U. S. 321; Van Blarcom v. Broadway Bank, 37 N. Y. 540; Bulkeley v. Welch, 31 Conn. 339; Brightman v. Reeves, 21 Tex. 70; Davis v. Funk, 39 Penn. St. 243; Belden v. Perkins, 78 Ill. 449.

or conversion appears, the pledgor, although he has paid all he owed, ought to make a demand before suing;¹ and still less is he justified in suing as for conversion where he has not made or tendered payment at all.² A pledgee's special transfer of his principal claim against the pledgor is held, however, to preclude him from using this by way of offset or counter-claim.³ The damages recoverable in trover are such as will make the pledgor whole; or, in general, the value of the pledge less what may prove due from him to the pledgee under the bailment.⁴

§ 255. **The same Subject.** — One who has taken property in pledge for becoming a surety upon his pledgor's bond cannot, when called upon to restore the chattels after the pledgor has fulfilled all conditions, set up technical objections to the instrument, of which the obligee did not choose to avail himself.⁵ Nor can any pledgee claim to retain the pledge, in order to secure new debts, or so as to apply it to different objects than those for which it is confided to him.⁶ As a rule, he has no right to dispute his bailor's ultimate title to the thing; but to this an exception may arise where the true owner makes such a demand upon the pledgee that the latter cannot disregard the paramount title without peril; for, as

¹ *Auld v. Butcher*, 22 Kan. 400.

² *Cunnock v. Institution for Savings (Mass.)*, 7 N. E. 869.

³ *Strong v. Nat. Banking Association*, 45 N. Y. 718.

⁴ For a wrongful sale, a pledgee of stock has been held liable both for the stock itself and all the profits he had made in the sale. *Langton v. Waite*, L. R. 6 Eq. 165. And see *Hunsaker v. Sturgis*, 29 Cal. 142; *Rankin v. McCullough*, 12 Barb. 103; *Conyngham's Appeal*, 57 Penn. St. 474. See, further, as to damages, *Cushman v. Hayes*, 46 Ill. 145; *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Fowle v. Ward*, 113 Mass. 548; *Gilson v. Martin*, 49 Vt. 474.

As to the pledgor's election to abide by the sale or collection, and suing as for money had and received, see *Mayo v. Peterson*, 126 Mass. 516; *Union Bank v. Roberts*, 45 Wis. 373; *post*, § 260.

⁵ *Blackwood v. Brown*. 34 Mich. 4.

⁶ *Post v. Tradesmen's Bank*, 28 Conn. 420; *Teutonia Nat. Bank v. Loeb*, 27 La. Ann. 110.

between his own pledgor and strangers thus asserting title, his only safety is in neutrality.¹

§ 256. **What the Pledge protects; Expenses, etc.** — The pledge is understood to protect not only the debt or engagement itself, but accumulating interest, if any, and all necessary expenses incidental to the pledgee's possession; and this seems to include even such interest as might be awarded on equitable grounds through the unjust delay of the pledgor in performing according to his undertaking.² Nevertheless the common law here furnishes little firm soil to tread upon; and inferences must be drawn, in the absence of express contract or usage, chiefly from the civil law and general reasoning.³

§ 257. **Rule as to Future Advances, etc.** — As to future advances to be made or liabilities to be incurred by the pledgee, there is no doubt that the pledge parties may, by agreement, so extend the pledge security as to cover these as well as present advances and liabilities: whereby we may sometimes find a bailee held to a pledge liability as custodian for a loss occurring at a moment when, in point of fact, the pledgor

¹ *Cheesman v. Exall*, 6 Ex. 341. And see *Whitlock v. Stewart*, 15 Ala. 601; *Duell v. Cudlipp*, 1 Hilt. (N. Y.) 166. This is the usual rule of bailment. *Supra*, § 22.

² *Story Bailm* §§ 306, 357, 358; 2 *Kent Com.* 583; *Kerr's Policy, in re*, L. R. 8 Eq. 331; 1 *Domat*, 3, 1, 3; *Hurst v. Coley*, 22 Fed. R. 183.

³ As against the allowance of interest or expenses *ex mora* may be cited a modern English decision, affirmed in the House of Lords, which denies to a bailee for hire the right to bring under his lien for service a charge for keeping the thing till his debt is paid; this being in truth, as Lord Wensleydale observed, a charge for keeping the thing for his own exclusive benefit. *Somes v. British Empire Shipping Co.*, 8 H. L. Cas. 338, 345 (1860). And yet a hirer's lien for his compensation is an excrescence, and less an incident of the bailment contract itself than a pledgee's right to hold continuously or realize, upon the pledgor's default, for his own security. *Third Nat. Bank v. Boyd*, 44 Md. 47; *Wilcox v. Fairhaven Bank*, 7 Allen, 270. Expenses properly incurred in realizing on the collaterals are chargeable on the proceeds. 22 Fed. R. 183. And see *supra*, § 215. Cf. 16 Neb. 592.

had ceased to owe him anything. This rule is, at our law, subject to some qualifications in favor of subsequent parties acquiring rights *in rem*; and the better opinion is that as to these, in the absence of positive evidence showing that the pledge was intended by the pledge parties to serve as collateral security for future loans or engagements, the pledgee must restore the thing upon receiving full satisfaction of the original debt or engagement.¹ Yet so desirable is it thought in these days to avoid circuity of action, that, between pledgor and pledgee alone, the circumstance of making a new loan or incurring a new liability, while the pledgee holds the security, raises a presumption in his favor, that the pledge was mutually designed to secure the subsequent, as well as the original, loan or liability.² The Roman law is supposed to have permitted a pledgee to insist upon the full satisfaction of all that might be due him on a general reckoning before giving back the pledge; but every such presumption of mutual intention is easily disturbed where proof exists to overthrow it.³ At all events, a pledge transaction with reference to a certain debt or engagement does not justify the pledgee in holding the pledge for another debt or engagement.⁴

§ 258. **Equitable Remedies on a Pledgor's Behalf.**—The pledgor's action at law, for repossession of the pledge, or damages as for its loss or detention, affords him, in general, an ample remedy as a party aggrieved.⁵ But while, for this reason, equity will not commonly interfere on his behalf, in

¹ 2 Kent Com. 584; 1 Atk. 236; *Jarvis v. Rogers*, 15 Mass. 389; *Pettibone v. Griswold*, 4 Conn. 158; *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

² See *Gilliat v. Lynch*, 2 Leigh, 493; 2 Vern. 691; 2 Kent Com. 584; *Story Bailm.* § 304.

³ *Story Bailm.* § 305; *Pothier Contrat de Nantissement*, n. 47.

⁴ *Supra*, § 178; *Woolley v. Louisville Banking Co.*, 81 Ky. 527; *post*, § 263.

⁵ See *Doak v. Bank of State*, 6 Ire. 309; *Taylor v. Turner*, 87 Ill. 296.

case of his pledgee's misconduct, it will, in a fit case, enjoin the pledgee's wrongful sale of collateral securities, and compel their specific redelivery to a pledgor who has discharged his full duty. This is a remedy peculiarly appropriate to family relics, and other things of intrinsic value whose loss cannot be well compensated in damages, and to such complex transactions as involve the taking of mortgage notes or of a life-insurance policy as security.¹

§ 259. **What is to be restored; Mutual Adjustment when Bailment ends.**—The identical thing pledged is, in general, what should be restored to the pledgor when the bailment terminates.² And the thing should be restored in good condition; subject, however, to such loss or damage as may possibly have occurred, imputing to the bailee neither fraud nor the lack of ordinary care and diligence in the course of the transaction.³ If the pledgee pays or accounts honestly for its full value, and the same is duly accepted, he acquires the pledgor's title to the thing.⁴ The net income, profits, increase, and advantages derived from the pledge ought to be restored with the pledge, or duly accounted for.⁵

§ 260. **The same Subject.**—Supposing the pledge to have been sold, or collected in whole or in part by the pledgee, such sale or collection being rightful, or the pledgor electing

¹ *Brown v. Runals*, 14 Wis. 693; *Knox v. Turner*, L. R. 9 Eq. 155. Shares of stock standing in the name of a testator who, in fact, held them merely as collateral security for a note of his son, one of the executors, were ordered transferred to the son on his paying the note. *Squier v. Squier*, 30 N. J. Eq. 627.

² But, as to the restoration of stock pledged, cf. *Thompson v. Toland*, 48 Cal. 99, and *Langton v. White*, L. R. 6 Eq. 165; *Dykers v. Allen*, 7 Hill, 497; *Lawrence v. Maxwell*, 53 N. Y. 19; *Squier v. Squier*, 30 N. J. Eq. 627.

³ *Supra*, §§ 204–209.

⁴ *Thompson v. Toland*, 48 Cal. 99.

⁵ 2 Kent Com. 578; *Merrifield v. Baker*, 9 Allen, 29; *Gilson v. Martin*, 49 Vt. 474; *Hunsaker v. Sturgis*, 29 Cal. 142; *supra*, § 212; *Houton v. Holliday*, 2 Murph. 111.

to treat it so, an account of the proceeds may be needful, in order to establish whether the pledgor shall have a certain surplus or be obliged to make up a certain deficiency. Since such proceeds are properly applied, first, to the satisfaction of the secured indebtedness or engagement, with its incidentals, in other words, to the pledgee's use; second, as concerns a surplus, if any, to the pledgor's use; the pledgor may recover the surplus rightfully his, in an action, as for money had and received.¹ And if the pledgor has made full payment and satisfaction outside of the security, the full proceeds of that security should be his; such an action ratifying in effect the pledgee's sale or collection. But, in order to maintain his cause, the pledgor must know clearly what to tender or demand; and hence, if the true balance be in uncertainty because of numerous and complicated or disputed items, proceedings in equity for account would be the pledgor's more appropriate remedy.²

§ 261. **The same Subject.**—Should the pledge be lost or injured through the failure of the pledgee to use due care and diligence, or his other remissness of duty, the pledgor may bring a special action for damages.³ But the practice is not uniform, as to permitting the pledgor to set off such loss or injury when sued on the principal debt.⁴ Where the pledgee sues his pledgor for wrongfully taking the pledge out of his possession, or keeping its custody in violation of some special trust reposed in him, the latter cannot set up

¹ *Hancock v. Franklin Ins. Co.*, 114 Mass. 155; *Overstreet v. Nunn*, 36 Ala. 666; *Stearns v. Marsh*, 4 Denio, 227; *Union Bank v. Roberts*, 45 Wis. 373; 126 Mass. 516. Whether such surplus may be recovered by way of set-off when the pledgor is sued, see 51 Vt. 378.

² *Conyngham's Appeal*, 54 Penn. St. 474; *Stephens v. Hartley*, 2 Montana, 501; 1 Story Eq. Jur. § 506. But the practice in some States tends to simplify common-law procedure in such cases. See *Faulkner v. Hill*, 104 Mass. 188.

³ *May v. Sharp*, 49 Ala. 140.

⁴ *Ib.*; *Winthrop Bank v. Jackson*, 67 Me. 570; *Lambertson v. Wincom*, 12 Minn. 232; *Reeves v. Plough*, 41 Ind. 204.

in defence the pledgee's conversion of other securities held for the same purpose, but must bring a separate action.¹ Yet in reason the pledgee thus suing him ought not to recover in damages more than will make him whole as to the unsatisfied portion of the secured debt or engagement.²

When the pledgee sacrifices by a total sale marketable securities whose partial sale would have sufficed to discharge all the pledgor's indebtedness, he incurs the risk of having to compensate the pledgor for his loss in replacing the securities thus sold in excess.³

§ 262. **The same Subject.**—If the pledgor has assigned his own interest in the pledge, and, by mutual consent of the assignee and pledgee, the pledge is afterwards sold, the pledgee cannot set off against such assignee who sues for the surplus proceeds, debts or engagements of the pledgor not embraced under the pledge at the time of the assignment.⁴

§ 263. **Extinguishment of Pledge; Satisfaction, Renewal, etc.**—In fine, the contract of pledge becomes extinguished, according to universal principles, by the complete discharge of the debt or engagement thereby secured, together with such incidental charges or expenses as may have lawfully accrued. And since discharge and satisfaction may take place, not only by one's receiving complete payment and fulfilment, but by his taking a higher or different security, by releasing and waiving his rights, or through operation of law, it will readily be inferred that the pledge contract may be extinguished in a corresponding variety of ways.⁵ After the discharge and extinguishment of the pledgor's main debt or engagement, in any of these modes, the pledged property

¹ *Hays v. Riddle*, 1 Sandf. (N. Y.) 248.

² *Sheldon v. Southern Express Co.*, 48 Ga. 625.

³ *Fitzgerald v. Blocher*, 32 Ark. 742.

⁴ *Van Blarcom v. Broadway Bank*, 37 N. Y. 540.

⁵ See *Story Bailm.* §§ 359–365.

will presumably revert at once to the pledgor, and the pledgee, as such, can have no further right to hold it.¹ For a pledge can only be held for that which it was given to secure. And as to the proceeds of pledge securities sold or collected, which remain in the pledgor's hands, the rule is similar.²

But satisfaction is to be distinguished from a mere renewal or extension of the note or obligation which the pledge was meant to secure,³ for such renewal is not presumed to discharge the security.⁴ And novation, or the taking of new security, will operate, if so intended by the parties, as simply a continuance, or, perhaps, a renewal of the pledge contract.⁵ So far as concerns pledgor and pledgee alone, there might be a series of obligations incurred and of pledges for security, stretching on indefinitely.

§ 264. **General Conclusion as to Pledge; Equity Principles.**—This whole doctrine of pledge is one which has unevenly developed at the common law; and our rules are frequently derived from the Roman law of pledge, which, however, in many points differs from our own; or else we borrow from the analogies of the chattel mortgage. Regarded as a bailment, the transaction imposes on the pledgee the duty of accounting for proceeds, if not of delivering back or over, in all cases where the bailment purpose has been fully accomplished; and should he continue against his pledgor's will to hold the thing after the bailment has properly terminated, his liability *in rem*, we may fairly assume, is like that of any other bailee for mutual benefit who wrongfully detains the

¹ *Ib.*; *Merrifield v. Baker*, 9 Allen, 29; 62 Ga. 271; *Mayo v. Avery*, 18 Cal. 309. *Hathaway v. Fall River Bank*, 131 Mass. 14.

² See *Rust v. Hauset*, 41 N. Y. Super. 467.

³ *Pigot v. Cubley*, 15 C. B. N. S. 701; *Wadsworth v. Thompson*, 8 Ill. 423; *Thompson v. Toland*, 48 Cal. 99. And see *Alliance Bank, ex parte*, L. R. 4 Ch. 423; *Levi's Case*, L. R. 7 Eq. 449.

⁴ *Collins v. Dawley*, 4 Col. 138; *Union Bank v. Slocomb*, 34 La. Ann. 927; *Shrewsbury Institution's Appeal*, 94 Penn. St. 309.

⁵ *Girard Ins. Co. v. Marr*, 46 Penn. St. 504.

thing which another intrusted to him for some special temporary purpose.

The modern transaction of pledge or collateral security, we may finally add, involves often some intricate details; but general maxims of equity in aid of the principles we have set forth in this chapter will readily solve them for the most part. The fair priorities among parties in or out of possession, *bona fide* conduct pursued to one's disadvantage without some notice which another who claims adversely should have given but did not, and the convenient practice of simplifying remedies in court by allowing one to recoup and counterclaim, all find scope in our present law of pledge; and the object to be steadily kept in view, in unravelling such cases, is to do justly and equitably by all concerned, so far as the circumstances permit.¹

¹ Courts of equity have to deal with some of the more perplexing cases which involve dealings in pledge or collateral security. Thus, where a pledgee, having parcels of stock owned by different persons, wrongfully repledges them as collateral for a loan, equity requires that the repledgee be satisfied, not out of the stock of any one owner, but so as to distribute the burden equitably among all the owners. *Gould v. Central Trust Co.*, 6 Abb. (N. Y.) N. Cas. 381. And if a creditor holding his debtor's note, and also the note of another person as collateral, transfers them after maturity to different persons, the rights of the transferees (the rule of negotiable paper not here applying) must depend upon the priority of the transfers. *Ware v. Russell*, 57 Ala. 43. For late instances of peculiar transactions by way of pledge, see *Foster v. Berg*, 104 Penn. St. 324; *Callanan v. Smart*, 60 Iowa, 305; *Davis v. Carson*, 69 Mo. 609; *Farwell v. Importers Bank*, 90 N. Y. 483; *Brown v. Merchants Bank*, 4 Ohio St. 445; *Foster, ex parte*, 20 S. C. 179.

PART V.

EXCEPTIONAL MUTUAL-BENEFIT BAILMENTS.

POSTMASTERS AND INNKEEPERS.

CHAPTER I.

POSTMASTERS.

§ 265. **Exceptional Bailments in General; the Public Vocation for a Recompense.** — Under the three several heads of which we are henceforth to treat in the present volume, the law comprehends all bailments of personal property to those who, in the due course of business, receive such property in one or another of these three capacities: as Postmaster, as Innkeeper, and as Common Carrier. Bailees of these three classes are essentially, as concerns the transaction in point, bailees for mutual benefit, deriving a compensation for their trouble, and undertaking to perform a beneficial service in return. But the common doctrines of bailment responsibility here fail us; for the law asserts an exceptional rule, from a regard less to the private intention of bailment parties than to the pregnant circumstance that the particular bailee has accepted the thing while in the exercise of an important vocation which, consistently with the public welfare, must be treated as a public trust. The exceptional bailment of the thing is made to one who shall perform, not on his individual undertaking, but as one of a well-recognized class.

Such a bailment necessitates, however, a hiring, an employment for reward. For, should an innkeeper give a stranger a

bed in his house out of charity, or a common carrier take a package gratuitously to its destination, this would constitute a bailment out of his course of business; and, the common incentive of a business compensation wanting, his bailment responsibility would not be such as we are now to consider, but that of a mere private individual, and, in fact, of a gratuitous bailee.

§ 266. **Postmasters, Innkeepers, and Common Carriers to be considered in Order.**— Compensation, however, enters very differently into the transaction of the government post-office business, and the carriage of the mails, from what it does where innkeepers and common carriers are concerned. And, for reasons to appear in the course of discussion, our exceptional mutual-benefit bailments are of two fundamentally distinct classes. I. That of Postmasters, or the public bailment to government agents, where the bailee's legal accountability must be exceptionally small. II. That of Innkeeper and Common Carrier, or the bailment to private parties exercising a public vocation, where the bailment accountability must be exceptionally great. By this, however, we are not to understand that the exceptionally great responsibility imposed upon innkeepers and common carriers ranges within precisely the same limits for both pursuits.

§ 267. **Postmasters; Nature and Origin of Mail Transportation.**— And first, as to Postmasters, the main subject of the present chapter. The business of mail transportation is essentially forwarding, or, as the law would now term it, carrying things; and on our Pacific slope but a few years ago, before railways spanned the American continent, private companies took a large share of this business and its profits, because they had better facilities than government for making quick delivery, and offered more ample insurance against loss.¹ Government carries the mails as the bailee of chattels. Not

¹ See *Hayes v. Welles*, 23 Cal. 185, which requires the sender of a valuable article by letter to give notice to the company which transports it.

only may a letter enclose money and valuables, but letters themselves are personal property ; so, too, are newspapers, cards, and manuscripts, not to mention those miscellaneous articles of moderate weight which under our later acts of Congress are permitted to swell the mail-bags, to the lessening of the public revenue, in order that government may become the cheap transporter of small wares for popular convenience. In all these instances, whether it be for the conveyance of written sheets of paper or merchandise samples, a bailment takes place, whose purpose is to transmit the thing and deliver it at the point of destination according to the bailor's directions ; the government, represented by designated officers, becomes the bailee ; and the postal stamp indicates the bailment compensation taken in advance, which, as the pivot of our present discussion, we are to observe, constitutes in these days the revenue, not of the officer, but of the government which employs him.

Whence is derived this exceptional responsibility at our law, narrowing down, as it appears, to a practical immunity from the consequences of careless transmission, where property is received in bailment at the post-office ? Not from any mysterious significance attached to the business itself, which might in any country be left to private individuals, nor, as we apprehend, from a public policy which singles out bailors of this class as especially suitable for bearing their own losses. It comes from this admitted state of things in Great Britain and the United States : that government carries on the post-office ; and the sovereign authority, on broad reasons of policy, refuses to submit its conduct to judicial inspection, or to respond to the suit of any private individual. The bailor who suffers from maladministration may have abstract right on his side ; but the courts are shut to him, and consequently his legal injury is without the means of redress. As for the individual postmaster, he is but a public agent, or servant of the government, and under the usual

rules of agency should not answer personally for the merely careless performance of his master's business.

§ 268. **History of Mail Transportation.**—The custom of providing public facilities for sending despatches, or placing at intervals public couriers to run from station to station,—from which placing comes our word *post*,—was not unknown to Rome under its first emperors; nor, indeed, to nations of far more remote antiquity.¹ But the ancient post was maintained for the special convenience of rulers, not the ruled; and the same appears true of the post establishments which Charlemagne and other rulers of the Middle Ages maintained in continental Europe. So useful an appendage of sovereignty could not but become of private service to persons high in authority at a time when the community kept up its moderate correspondence by the uncertain hand of messengers, travelling friends, peddlers, carriers, and itinerants generally. In England, as early as the reign of Edward I., all royal messengers for the delivery of despatches throughout England and in other parts of the king's dominions beyond the seas were placed under the supervision of a particular officer of the king's household; whence came, in the course of years, the institution of a postmaster-general, and a gradual extension of the postal service by royal proclamation and orders in council, until merchants and the general public were fairly accommodated; the crown finding its advantage in gaining a handsome revenue from carrying private despatches, letting the post-horses to hire, and transmitting packets of moderate size. From the accession of Scotland and the colonization of America dates a rapid and systematic increase of the postal facilities of Great Britain, in further-

¹ Darius, king of Persia, more than five centuries before the Christian era, connected his capitals, Susa and Ecbatana, with the most distant parts of his empire, by post-roads, along which were buildings for accommodating those who travelled in the king's name, and relays of couriers to convey royal messages. See Smith Hist. of Greece, 51.

ance of a far-reaching mercantile policy; and during the civil wars of the Stuarts, whether king or parliament won, the post-office was cherished by all parties for its revenue and the general convenience thus afforded to the citizens. As a legalized and permanent branch of public administration, its benefits were, at times, however, farmed out to individuals; and one result of the postal system, which parliament in those days did not blush to call a blessing, was, that it enabled officers of state, by prying into the correspondence intrusted to them, to detect treasonable plots and conspiracies. The act of 12 Charles II. c. 35, upon which some have based our modern postal system, simply codifies and places upon a more systematic footing for Great Britain an establishment whose cradle is shrouded in remote centuries.¹

As regards the American Colonies a royal postal system on a comprehensive scale was projected early in the eighteenth century. This was organized by Franklin, whom the British crown selected as colonial postmaster-general; and, by the outbreak of the Revolution, it had become so indispensable to the community, that the Continental Congress would not, in the interest of the American public, suffer the office to lapse when the Colonies declared their independence of Great Britain. Under our Articles of Confederation, and still later the Constitution of the United States, the power to establish post-offices was, by common consent, vested in the United States. Constantly, then, was our post-office maintained on its continental or national footing, so that the line of American postmaster-generals can alone, among our present federal officials, be traced directly back to royal appointment and the days of Queen Anne.²

¹ See Encycl. Britt. "Post-office;" New Am. Cycl. "Post."

² *Ib.*; Articles Confed. art. 9; Constitution of United States, art. 1, § 8. The general power of the Congress of the United States to regulate at discretion the transmission of matter through the mails is strongly upheld in the recent case of Jackson, *ex parte*, 96 U. S. 727. United States Statutes forbid private expresses to carry mailable matter where post-

§ 269. Theoretical Bailment Responsibility of Government.

— Thus closely is the postal system subservient to sovereign power. Were government lawfully to monopolize railway traffic, the same practical bailment immunity would at once result, unless the legislature ordered it otherwise. But to a partial extent statutes now afford legal redress to individuals who encounter injury in the course of their contract dealings with supreme authority.¹

Should a common-law country ever submit to a legal exposition the rightful standard of government responsibility to individual bailors as a mail-carrier, the courts would not probably reckon this at the extraordinary standard of a common carrier (since widely different considerations of public policy apply), but rather at that of ordinary bailees for hire; while perhaps, were it made to appear, from public tables, that the postage charged the injured individual served not for actual recompense in the bailment, but merely to help defray the necessary costs of a transportation which government carried on at a loss for the benefit of the public, the standard would fall to the register of gratuitous bailment. But that a bailment duty of some sort co-exists on the part of government, apart from the adequate means of enforcing it, we cannot reasonably doubt.

§ 270. Postmasters, Mail Contractors, etc., as Public Servants.

— With regard to bringing actions against the individual postmaster-general, or local postmaster, for losses occasioned by negligent transmission through the mails, the fundamental objection is that servants are not, as a rule of law, personally liable in the course of a service performed on behalf of their master. If government, the common master of such parties, routes are established. *Blackburn v. Gresham*, 16 Fed. R. 609. And it is a penal offence to detain, delay, or open the mails. 17 Fed. R. 837. Modern legislation in England monopolizes the postal and telegraph business on behalf of government.

¹ See U. S. Rev. Stats. § 1059, as to jurisdiction of the Court of Claims. And see 1 Am. Law Rev. 653, article by this author.

will not respond to the individual loser, yet the postal business, with its incidental profit or loss, is a matter of government or public concern; nor, without gross injustice, could public officers, individuals paid out of the treasury as mere agents in an immense concern of public administration, be exposed to a fretting litigation simply because the bailee himself refused to come into court. The authorities, English and American, are well agreed that, for negligence in the course of his usual and understood public employment, a postmaster, or the postmaster-general himself, while acting honestly and committing no wilful injury, is not personally liable to the sender of articles by mail.¹ This rule extends to the duly appointed and sworn deputies and assistants of a postmaster who are engaged in the public and not his private service; since all are servants of one master, as regards the bailment responsibility.² But should a postmaster or other public officer employ a mere private assistant, as, for instance, a person not sworn into office as the law positively requires, he may, in a measure, render himself personally answerable for such a party's carelessness and misbehavior, as being in effect his private employer.³

Mail contractors, too, under like reservations, enjoy this immunity from the suits of individuals who make use of the postal facilities; for they are servants of the government performing certain duties in connection with other public servants.⁴

¹ *Lane v. Cotton*, 1 *Ld. Raym.* 646, *Lord Holt*, C. J., dis.; *Whitfield v. Despencer*, *Cowp.* 754, 765, per *Lord Mansfield*; *Dunlop v. Munroe*, 7 *Cr.* 242; *Story Bailm.* §§ 462, 463; *Schoul. Dom. Rel.* § 483; *Keenan v. Southworth*, 110 *Mass.* 474; *Central R. v. Lampley*, 76 *Ala.* 357.

² *Ib.*

³ *Bishop v. Williamson*, 2 *Fairf.* 495; *Ford v. Parker*, 4 *Ohio St.* 576; *Schroyer v. Lynch*, 8 *Watts*, 453; *Wiggins v. Hathaway*, 6 *Barb.* 632.

⁴ *Conwell v. Voorhees*, 13 *Ohio*, 523; *Hutchins v. Brackett*, 2 *Fost.* 252; *Central R. v. Lampley*, 76 *Ala.* 357. See *Sawyer v. Corse*, 17 *Gratt* 230, where the exemption was held inapplicable to a contractor's agent who was not duly qualified.

§ 271. **The same Subject; how far Liable.** — But the relation of master and servant here, as elsewhere, fails to cloak one's acts which are committed clearly outside the usual or permitted scope of service; whether because the act is tortious or as having been performed by one in no such public capacity. Hence, for losses really occasioned by one's negligent management of his private store or dwelling-house, where he happens to keep the post-office, he ought to respond personally.¹ So, too, where a letter containing money is taken to be registered to a certain address, and the postmaster finds afterwards that it cannot be registered to that place, he incurs a personal risk and is not protected in his public capacity if he forwards that letter by mail unregistered;² for he was not thus employed by the sender. And still more clearly does this hold of utterly dishonest, wanton, and fraudulent conduct on his part; for no sanction of a master or principal can authorize a wrong.³ Should a postal subordinate break open letters, embezzle their contents, pilfer, purloin, steal, maliciously destroy, or otherwise commit injurious acts to the sender, clearly outside the scope and shelter of his public employment, not only may he be held personally liable in damages to the aggrieved party, but so may his principal, if the latter sanctioned or abetted the misconduct.⁴ In any case it is incumbent upon every postmaster or chief employer whom government intrusts with the superintendence and selection of subordinates under him, as well as upon one who employs his private assistants, to make no such careless, reckless, or corrupt appointments, nor to conduct himself so utterly regardless or reckless of discipline about his office, that justice would be compelled to treat him as a contributor to the active mischief

¹ *Ford v. Parker*, 4 Ohio St. 576.

² *Fitzgerald v. Burrill*, 106 Mass. 446.

³ *Ib.*; *Ford v. Parker*, 4 Ohio St. 576.

⁴ *Dunlop v. Munroe*, 7 Cr. 242; *Schoul. Dom. Rel.* § 483; *Wiggins v. Hathaway*, 6 Barb. 632; *Schroyer v. Lynch*, 8 Watts, 453; *Keenan v. Southworth*, 110 Mass. 474. And see *Foster v. Essex Bank*, 17 Mass. 479.

of the subordinate, and so make him jointly answerable for the legal consequences.¹

But, in general, every postmaster who uses due care and vigilance, according to his opportunities, in selecting, retaining, and discharging his subordinates, and in superintending the performance of their functions, is no more accountable for their torts and frauds than any stranger.²

§ 272. **Local Letter-Carriers; what is "Mail."** — City or local letter-carriers are, by our acts of Congress, authorized to receive letters duly prepaid while going on their respective routes. And giving a letter thus to a city letter-carrier, which he takes and puts in his bag to be carried to the office, or dropping it in one of the street boxes placed by government for the reception of letters, is virtually a deposit in the mail as much as leaving it at the general post-office. Indeed, as it was recently observed in one of our State courts, the word "mail" means originally, a wallet, sack, budget, trunk, or bag, and, in connection with the post-office, the carriage of letters by whatever means under public authority. "Mail" referred in early times to the valise which postilions or carriers had behind them, and in which they carried letters; but after the establishment of post-offices, post-routes, and post-coaches, it acquired a more general signification.³

¹ *Ib.*

² An injunction does not lie against a postmaster for refusing to deliver mail matter. *Boardman v. Thompson*, 12 Fed. R. 675. *Seem* replevin or a suit for damages is available. *Ib.*

³ *Wynen v. Schappert*, 6 Daly (N. Y.), 558.

TELEGRAPH AND TELEPHONE BUSINESS. Some recent authorities have shown a disposition to range the business of telegraphing under the head of Bailments. See *Redf. Carriers*, § 574; *Birney v. New York, &c. Teleg. Co.*, 18 Md. 341. True, this modern invention is closely allied, in a certain sense, to the railway and post-office, and might be specially discussed with the former subject. But it fails in the essential particulars which justify treating of those two topics in works like the present; for the law perceives in the employment of the telegraph no delivery of a thing in tangible shape, in order that the same thing may be delivered back or over, but the undertaking of one with special facilities to perform

Letter-carrier routes are held to be "post-routes" and subject to the same public monopoly of the business.¹

a certain piece of business, like a courier who is chosen to run upon a verbal errand because of his wondrous swiftness. There is here no engagement *in rem*; no bailment worthy of the name; for, even if the sender leave a written message, this writing is not delivered, but remains mere waste paper or an office voucher, after the telegraph company has made and delivered its own correct copy. The true issue of responsibility, instead of involving the due preservation and the safe and prompt delivery over of that which the sender delivers, hinges upon the due preparation and the prompt and faithful transmission of a copy thereof, and the question of negligence is presented under something quite unlike the bailment aspect. In the later use of the telephone the case still less resembles that of bailment.

Telegraphing, therefore, seems properly classed for legal treatment with kindred topics of Agency, Service, General Mandate, or the comprehensive law of Contracts; and so is it with the Telephone business. And though these are vocations unique in many features, so as to justify, perhaps, a special text-book; and while, too, in some aspects, there is a vocation exercised which involves the rights of the public, the governing principles are by no means foreign and exceptional, but such as would apply in point of responsibility to any parties paid for delivering quickly and correctly a verbal message, or wherever one engages for hire to accomplish some general transaction.

Telegraph (and probably Telephone) companies are not responsible as common carriers, but only according to the nature of their undertaking. Redf. Carriers, § 556; *Birney v. New York, &c. Teleg. Co.*, 18 Md. 341; *Western Union Teleg. Co. v. Carew*, 15 Mich. 525; *Young v. Western Union Teleg. Co.*, 65 N. Y. 163; 23 Fed. R. 315; 18 Hun, 157; *Grinnell v. Western Union Teleg. Co.*, 113 Mass. 299. Their business should be transacted with reasonable despatch, correctness, and fidelity, in accordance with their engagement. *Western Union Teleg. Co. v. Ward*, 23 Ind. 377; *New York, &c. Teleg. Co. v. Dryburg*, 35 Penn. St. 298; *Bartlett v. Western Union Teleg. Co.*, 62 Me. 209. And for loss occasioned by their default or misconduct, the ordinary rule of damages under a contract will apply. Redf. Carriers, §§ 561, 562; *United States Teleg. Co. v. Gildersleeve*, 29 Md. 232; *Squire v. Western Union Teleg. Co.*, 98 Mass. 232; *Baldwin v. United States Teleg. Co.*, 45 N. Y. 744. A telegraph company is bound to exercise reasonable care in the construction and maintenance of its line, but is not bound beyond this. *Ward v. Atlantic Teleg. Co.*, 71 N. Y. 81. There might appear contributory negligence on the sender's part, such as to absolve the company from blame.

¹ *Blackham v. Gresham*, 16 Fed. R. 609.

Leonard *v.* New York, &c. Teleg. Co., 41 N. Y. 544; Baldwin *v.* United States Teleg. Co., 45 N. Y. 744, 751. Koons *v.* Western Union Teleg. Co., 102 Penn. St. 164. And see, in general, Redf. Carriers, § 556 *et seq.*; Scott and Jarnagin Telegraphs; Allen Telegraph Cases.

There may be culpable negligence on the part of the company, in wrongly transmitting the message which was delivered in sufficiently plain language. 71 Ga. 760; 37 Ohio St. 301. Or for unreasonably delaying to send or deliver the message. 59 Tex. 542; 84 Ind. 176. As to messages in cipher, see 75 Ala. 168. The latest cases appear to well establish the principle that the company may stipulate against liability for damages, except for fraud or gross negligence on its part (though *semble* not for complete immunity), where messages are not repeated. Clement *v.* Western Union Teleg. Co., 137 Mass. 463; 18 Fed. 717; 89 N. C. 334; Womack *v.* Western Union Teleg. Co., 58 Tex. 176; 11 Neb. 87; 18 Hun, 157. Or where night messages are sent at half-rates. 57 Tex. 283. Reasonable limits in time, too, may be set to the presentment of claims for damages on behalf of those sending messages. 95 Ind. 228; 63 Tex. 27; 57 Wis. 562.

The rule of telegraph or telephone liability is not as yet decisively settled; but it would appear that the English and American cases are in-harmonious in this respect. For the inclination in this country is to hold telegraph companies liable for such damages as may directly ensue to a receiver in consequence of its tardiness or misdelivery of a message, whenever this appears inexcusable; while in Great Britain it is repeatedly affirmed that the injury suffered by the receiver in consequence of the company's negligent transmission cannot serve as the basis of an action against the company. Dickson *v.* Renter's Teleg. Co., 2 C. P. D. 62; s. c. on appeal, 3 C. P. D. 1; Sanders *v.* Stuart, 1 C. P. D. 326. Cf. Scott and Jarnagin Telegraphs, § 230; American cases cited, *supra*; Allen Telegraph Cases, §§ 728-734.

The English telegraph act of 1869 brings this business under public direction, like that of the ordinary mails, by giving to the postmaster-general the exclusive privilege of transmitting telegrams within the kingdom; and conversations through the telephone are pronounced "telegrams" within this statute. Attorney-General *v.* Edison Teleph. Co., 6 Q. B. D. 244.

CHAPTER II.

INNKEEPERS.

§ 273. **The Innkeeper as a Bailee.** — The vocation of innkeeper falls well under the head of bailment in respect of caring for animals, baggage, and other personal property, committed by a guest to his host's keeping; which topic, inclusive of the innkeeper's lien thereon for his charges, affords almost the only point of view from which our civil courts have steadily regarded the rights and duties of this interesting class of persons; though one's treatment of his guest has sometimes been discussed, while the enforcement of liquor and license laws occasionally commends the innkeeper to the inspection of other tribunals.

§ 274. **Nature and Origin of this Exceptional Liability.** — During many centuries, and most emphatically when journeying was slow and by the high road, the uniform excellence of their inns was one of Great Britain's standing boasts. That English literature should take its spring flavor from a provincial hostelry, in whose wide chambers and stables, something like a century and a half before Columbus crossed the Atlantic, a company of twenty-nine mounted pilgrims were "eased at best," is quite in keeping with the character of a people whom visitors from the continent of Europe in Elizabeth's age pronounced dwellers in houses of sticks and dirt, but choice eaters and drinkers.¹ The genuine home comforts

¹ See 1 Macaulay *England*, c. 3; Daly, J., in *Cromwell v. Stephens*, 2 Daly (N. Y.), 15; Leopold Shakspeare, Furnivall Introduction, XIV., XV.

Harrison, in *Holinshed's Chronicles*, ed. 1587, bk. 3, c. 16, pp. 246, 283, gives a lively description of English inns, as they were reputed in the

of the English inn have inspired native poets and chroniclers of every age since Chaucer's, except, perhaps, the present; and our dramatic literature preserves the type of an obliging, full-fed, jovial landlord, who, if he sometimes joined foot-pads on the road to pick a purse, afforded the traveller a sure sanctuary, so long as he kept under cover of the roof and paid for what he ordered. During the seventeenth century, when mounted highwaymen so infested the main roads leading to London, that travellers had to journey with an armed escort, excellent inns of every rank abounded, as history has recorded, and the innkeeper was the servant, and not, like the host of other civilized countries, the tyrant of those who crossed his threshold.¹

The stubborn independence of the Englishman, that relish for the substantial comforts of life which has always marked him, and his disposition to take his home with him, when he travels at all, are traits which may largely explain the peculiar mould of English innkeeping. Before trustworthy innkeepers abounded in the land, the lord of a castle opened his gates and entertained travellers who stood in need of food and a night's lodging, each according to his degree. Much of the shaping influence, however, must be conceded more immediately to the courts, and to that exceeding measure of

days of Shakespeare and Queen Elizabeth. He says that each comer had clean sheets and whatever variety of victuals a guest might choose to call for, according to his means; and that in towns called thoroughfares there were great and sumptuous inns for the convenience of such travellers and strangers as might pass to and fro. And the same authority (p. 283) confirms the impression one gathers from dramatic writers of this period, that the host, while keeping on the shady side of the law, and entertaining his guests handsomely during their stay, was not always scrupulous about becoming a sly accomplice of the highway robbers, but would put these marauders on the scent of some departing patron whose saddlebags, as his keen eye or that of his hostler had assured him, were well worth rifling.

¹ See 1 Macaulay England, c. 3; Daly, J., in *Cromwell v. Stephens*, 2 Daly (N. Y.), 15.

responsibility which the common law from the earliest period fastened upon the innkeeper; and this out of regard for the confidence which wayfarers must necessarily repose in him. If the thief or highway robber might elude justice, slipping away with his booty, not so easily could one whose premises and stock might be attached at any private suit, and his business broken up, on the guest's mere showing that his goods and money had disappeared while *infra hospitium*. This being the rule of public policy which the courts would vigorously enforce, on occasion, with a sympathizing jury, it followed that English innkeepers must have been, not only men of substance, but men of discretion as well, if not of sound morals. An extraordinary responsibility, it is true, attached to innkeepers in imperial Rome, whence the doctrine pervades the modern jurisprudence of civilized Europe; and perhaps our ancestors filled their pitcher at the same fountain, though failing to accredit such a source. But to a more rigid administration we owe it, probably, that English inns were a safe haven at a period when those of the Continent were notoriously the nests of bandits, and only monasteries, of whose hallowed guardians the most hardened ruffian stood in awe, afforded to pilgrims, for centuries, the only suitable precinct for refreshment and repose.¹

¹ The civil law relative to innkeepers is given at length in 1 Domat Civ. Law, Part I., Book 1, tit. 16, § 1. How nearly its rules correspond to ours will appear by comparing the following extracts:—

“*Engagements of Innkeepers.* There is formed between the innkeeper and traveller an agreement, by which the innkeeper obliges himself to the traveller to lodge him, and to take care of his baggage, horses, and other equipage; and the traveller on his part binds himself to pay his charges.

“*A Covenant either Express or Tacit with the Innkeeper.* This engagement is formed usually without any express covenant, by the traveller's bare entering into the inn, and his depositing his baggage and other things into the hands of the master of the inn, or of those whom he appoints to take care of it.

“*In what manner the Innkeeper is made accountable for the Things by the Act of Domestics.* The innkeeper is accountable for the acts of those of his family and of his domestics, according to the functions in which they

§ 275. **Preliminary Points to be considered.**— Before dwelling at length upon this exceptional measure of responsibility which the common law has affixed to innkeepers for the

are employed. Thus, when a traveller gives to the servants who have the keys of the chambers, a cloak, bag, or other things, or when he puts his horse into the stable, under the care of the hostler, the master of the inn is answerable for them. But if the traveller, upon his arrival, delivers a bag of money to a child, a scullion, out of the master's and mistress's sight, the innkeeper will not be answerable for a bag of this consequence deposited in such a manner.

“Care of the Innkeeper. The master of the inn is obliged to watch, or cause to be watched by others, with all possible care, all the things that the traveller brings and deposits in the inn, whether it be in the presence or absence of the master. Thus, he is answerable, not only for his own faults, but even for the least neglect, either in himself or servants; and he is only discharged from what may happen by such accidents as the greatest care could not have prevented.

“Innkeepers answerable for Thefts. Although innkeepers are not paid in particular for watching or keeping what is deposited in the inn, but only for the lodging, and for other things which they furnish to travellers, yet they are nevertheless bound to take the same care as if they were expressly paid for watching the goods. For this is an accessory to the commerce which they drive; and it is for the interest of the public, considering the necessity under which travellers are to trust innkeepers, that they be bound to an exact and faithful care of the things committed to their custody; and that they be made answerable even for thefts. For otherwise they might with impunity commit the thefts themselves.

“They are accountable for the Acts of any of their Family or Domestics. If any one of the domestics, or of the family of the innkeeper, causes any loss to a traveller, as if he steals from him even that which was not specially intrusted with any of the people of the inn, or if he damages his goods, the master of the inn shall be accountable for the value of the thing lost, or of the damage done.

“They answer for their Servants only for what they do in the Inn. The engagement of the innkeeper, for the act of his domestics, is limited to what is done in the inn; and if any of his servants steals any thing, or does any damage in another place, the master is not accountable for it.”

In the Roman law, innkeepers do not appear to have had an exceptional responsibility imposed upon them, until the Prætor issued a special edict, declaring that if shipmasters, innkeepers, and stable-keepers did not restore what they had received to keep safely, he would give judgment against them. See Dig. 4, 9, 1; with comments of Ulpian and others thereupon; Story Bailm. §§ 458, 464–468. And see *post*, § 287.

advantage of the public, let us see what persons and what property are embraced under the provisions of the rule. To consider, then: (1) who are innkeepers; (2) who are guests; (3) to what property of the guest does the exceptional liability relate; (4) limits of the relation. And here let us bear in mind that, as in our other instances of exceptional bailment, the exception is found in one's rewarded exercise of a public vocation to which public policy assigns a rule.¹

§ 276. **Who are Innkeepers; Circumstances considered.**—

1. Who are innkeepers? The older cases have been wont to define an inn as a public house for lodging and entertaining travellers while on their way; an innkeeper as one who, for reward from such persons, keeps open such a house for their convenience; and the lodging or entertainment, as extending to the wayfarer's horses and full travelling equipage.² The typical English inn has commonly some name, indicated by an emblematic device or painted sign before the door; which, fanciful of itself, and seldom used to denote the individual landlord, may serve as a plain token of publicity. There need be, however, no sign before the door to constitute one legally an innkeeper, since this is but one means of showing that the house is an inn.³

Modes of entertaining alter with the fashion of the age, and to preserve a clear definition is not easy. It is not wayfarers alone, or travellers from a distance, that at the present day give character to an inn; the point being rather that people resort to the house habitually, no matter whence coming or whither going, as for transient lodging and entertainment.⁴ Nor do innkeepers furnish entertainment for "man

¹ *Supra*, § 265.

² *Calye's Case*, 8 Co. 32; 5 Mod. 427; *Bac. Abr. Inns and Innkeepers*, B.; *Thompson v. Lacy*, 3 B. & Ald. 283, per Bayley, J.; *Dickerson v. Rogers*, 4 Humph. 179.

³ *Bac. Abr. Inns and Innkeepers*, B.; 12 Mod. 255, per Holt, C. J.; *Dickerson v. Rogers*, 4 Humph. 179; *Clary v. Willey*, 49 Vt. 55.

⁴ *Walling v. Potter*, 35 Conn. 183; *People v. Jones*, 54 Barb. 311;

and beast" to the same extent as formerly; but, at the great centres of passenger transportation, guests usually appear without carriages or private equipage of any kind; and it has long been concluded that an inn may be carried on without inn-stables at all.¹ And though victuals and lodgings have usually been supplied together in an inn, yet inns may be kept, as many now are, on the so-called "European plan," where one pays a certain price for his room, and settles for meals separately according to what he may incline to order at a refectory; and if comers in such a house are registered and assigned rooms with their baggage as in other inns, and the keeper of the house holds out the refectory as part of his general establishment, he should be deemed an innkeeper.² Nor would it be thought essential, in order to give a modern house the character of inn, that wines or spirituous liquors are kept on hand for the patrons of the place.³

The permanent character of the lodging and entertainment offered the public bears on this issue. Some authorities incline to the view that one who keeps open a public house merely for a short season of the year, at a watering place, for instance, cannot in strictness be called an innkeeper.⁴ But any such statement, if not positively inaccurate, is misleading; for, unless the manner of entertainment be of quite a limited and special description, one cannot well deny to a summer or winter hotel the capability of becoming, in the fullest sense, an inn for the time being. And certainly

Pinkerton v. Woodward, 33 Cal. 557. The definition of Oakley, C. J., in *Wintermute v. Clark*, 5 Sandf. (N. Y.) 242, 247, that an inn is "a public house of entertainment for all who choose to visit it," is approved in these cases.

¹ *Thompson v. Lacy*, 3 B. & Ald. 283.

² *Krohn v. Sweeney*, 2 Daly (N. Y.), 200; *Bernstein v. Sweeney*, 33 N. Y. Super. 271; *Pinkerton v. Woodward*, 33 Cal. 557.

³ See *Pinkerton v. Woodward*, 33 Cal. 557, 596, per Rhodes, J.

⁴ *Story Bailm.* § 475; *Bac. Abr. Inns and Innkeepers*, B.; *Southwood v. Myers*, 3 Bush, 681; *Bonner v. Welborn*, 7 Ga. 296. Cf. *Parkhouse v. Forster*, 5 Mod. 427.

one who regularly keeps an open house for the public does not forfeit the character of innkeeper simply because his patronage comes rarely or periodically.¹ But merely entertaining people at some special gathering, as at a horse-race, or on other unfrequent and brief occasions, for the profit of one's private house, is held not to constitute that house an inn.²

§ 277. **The same Subject; Tavern, Hotel, Restaurant, etc. —** The statutes of our States not unfrequently use the terms "inn," "tavern," and "hotel," as synonymous;³ yet there are shades of difference in these words which British legislation touches off more delicately.⁴ In the last century and the earlier part of the present, it was common for Americans to style their inns "taverns;"⁵ but those more choice of speech have defined "tavern" rather as a place for procuring food and drink, without lodging.⁶ Both "taverns" and "inns," however, are words of humble extraction; though the latter term, which is now falling into popular disuse, may serve all the better for the technical purposes of legal nomenclature.

Rapid transit tends to focalize the innkeeping business, diverting it from old market towns and stations where fresh horses used to be put to the mail coach; and we find substituted for those home comforts which suited a simpler age the display of palatial glories such as might set a sight-seeing crowd agape. The present caravansary style of entertaining

¹ See *Clary v. Willey*, 49 Vt. 55; *Kisten v. Hildebrand*, 9 B. Monr. 72.

² *State v. Mathews*, 2 Dev. & Bat. 424; *Lyon v. Smith*, 1 Morris, 184; *Howth v. Franklin*, 20 Tex. 798.

³ *People v. Jones*, 45 Barb. 311; *Bonner v. Welborn*, 7 Ga. 296.

⁴ See *Smith v. Scott*, 2 Moo. & Sc. 35; *Jones, in re*, 3 Ch. D. 457.

⁵ See *Weld Travels*, 35; *Davis Travels*, 32. English travellers in the United States about the opening of the present century expressed their surprise at finding that every public house was called a "tavern."

⁶ See *Worcester Dict.* "Inn," "Tavern;" Webster *Id.*; *per curiam*, in *Queen v. Rymer*, 2 Q. B. D. 136; *Smith v. Scott*, 2 Moo. & Sc. 35.

has doubtless its attractions; though fascinating those most whom the family hearth fails to cheer, and who crave new faces and the turmoil of a changing crowd. Considerations like these, with motives of economy, or the desire to purchase the most style and luxury at the least cost, bring men and women nowadays into the inn as their abiding place. Hence, in this country, even more than in Great Britain, the rise of the modern "hotel" or "house," as something more pretentious, more of a substitute for home life, than the Anglo-Saxon inn or tavern ever aspired to be; the former word suggesting that Parisian influence which in modern times dominates polite society. A "hotel," in the primitive sense, regards lodgings alone, or the French home, in which sense there would be no inn at all, but dwellings arranged by piles instead of rows; and yet, in almost universal parlance, "hotel," like "house," in the public sense, now signifies simply a genteel inn.¹

¹ Worcester Dict. "Hotel;" Webster Ib.; Johnson Encycl.

The English Innkeeper's Act of 1863 declares that the word "inn," as used in that act, shall be interpreted to mean any hotel, inn, tavern, public house, or other place of refreshment, the keeper of which is now, by law, responsible for the goods and property of his guests; and the word "innkeeper" shall mean the keeper of any such place. Act 26 & 27 Vict. c. 41, § 4.

In *Cromwell v. Stephens*, 2 Daly (N. Y.), 15, will be found a learned and interesting historical sketch of the English and European inn, by Daly, J. In the course of this valuable opinion, the first use in England of the word "hotel" is ascribed to the general introduction in London, after 1760, of the Parisian apartment-house. It is added that the word was brought over to this country about 1797, when enthusiasm ran high on behalf of the French revolutionists. *Ib.* 2 Daly, 20, 21. Yet, as the writings of early American travellers and the contemporary newspapers show, the "tavern" maintained a strong footing in this country until a much later period, though some inns had thus early adopted the name of "hotel," while the French cause continued popular with Americans. To the rapid increase of travelling facilities, dispensing with stops at little towns on the old post-roads, we may chiefly ascribe the decline of the early American tavern. The reader of 2 Kent Com. 592-597, on the subject of innkeepers, will perceive, from its language, how familiar were

One who merely furnishes food or drink to the public, whether his establishment be called a tavern, a coffee-house, an ale-house, a restaurant, or a bar-room, is not legally an innkeeper.¹ Nor can the proprietor of a sleeping-car attached to a train be so regarded; there being only accommodations for repose and toilet furnished, and this only for a particular class of travellers on a particular trip.² Nor can a steamship company, though its passengers be lodged and fed.³

§ 278. **The same Subject; Apartment-houses, Boarding-houses, etc.**—Whether the utter omission to provide a place for meals on the premises is enough to take a house for transient lodgers out of the legal fellowship of inns, is not clearly determined;⁴ and yet, furnishing a public parlor, a baggage-room, an office for the immediate registry of all who may arrive, and the like public conveniences, are properly reckoned as means of public entertainment. But our modern apartment-houses, often styled “hotels,” whose rooms, suites, or flats are let, furnished or unfurnished, to individuals for their private lodging and housekeeping convenience, cannot be reckoned inns, even though transient people be occasionally lodged there, and the proprietor leaves a janitor or other personal representative in charge.⁵

Innkeepers, once more, should be distinguished from boarding-house keepers, who supply, it may be, the same lodging and entertainment, but without the same publicity.

the terms “inn” and “tavern” in American dialect, as late as 1826. Judge Story, too, makes but bare allusion to keepers of hotels, and that with a query. Story Bailm. § 475 *n*.

¹ *Doe v. Laming*, 4 Camp. 77; *Queen v. Rymer*, 2 Q. B. D. 136; *Walling v. Potter*, 35 Conn. 183; *Carpenter v. Taylor*, 1 Hilt. 193. See 11 Daly, 234; 10 Fed. R. 4.

² *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

³ *Clark v. Burns*, 118 Mass. 275.

⁴ *Krohn v. Sweeney*, 2 Daly, 200; *Willard v. Reinhart*, 2 E. D. Smith, 118; *Pinkerton v. Woodward*, 33 Cal. 557.

⁵ See *Cromwell v. Stephens*, 2 Daly, 15, per Daly, J.; *Pinkerton v. Woodward*, 33 Cal. 557, per Rhodes, J.

An inn is a house whose keeper holds himself out as ready to receive all who may choose to resort thither and pay an adequate price for the entertainment, while the keeper of a boarding-house reserves the choice of comers and the terms of accommodation, contracting specially with each customer, and most commonly arranging for long periods and a definite abode. Closely as a large modern boarding-house may resemble an inn in its management, there is yet to distinguish it an air of greater privacy, rarefied still further by the lack of a public title.¹ A boarding-house or lodging-house keeper, pursuing that means of livelihood, is again to be discriminated from a private householder who only casually or upon special consideration receives a boarder into the family.²

§ 279. **The same Subject; General Conclusion.**— We may gather, therefore, that the legal conclusion as to who are innkeepers must depend upon many circumstances combined: such as the regularity of one's occupation; publicity; one's method of receiving compensation; and his means of accommodating all who may choose to come and go. In short, an innkeeper, one who exercises the public vocation we are now describing, may well be defined as one who regularly keeps open a public house for lodging and entertaining transient comers, on the general expectation of his suitable recompense. A jury may properly decide, under judicial instruction, whether one is an innkeeper or not, upon all the proof submitted;³ and difficult as it may be to say just what constitutes an inn, and what does not, the average of mankind readily apply the distinction.

¹ *Dansey v. Richardson*, 3 El. & Bl. 144; *Parkhurst v. Foster*, 1 Salk. 387; *Holder v. Soulby*, 8 C. B. N. S. 254; *Cromwell v. Stephens*, 2 Daly, 15; *Pinkerton v. Woodward*, 33 Cal. 557. Private lodging-houses, where meals are not supplied, were a much later institution in the United States than in England; and early English travellers in this country grumbled at having to go into boarding-houses. See *Weld Travels*, 35.

² *Cady v. McDonald*, 1 Lans. 484.

³ *Clary v. Willey*, 45 Vt. 55.

The innkeeper may be not only an individual or a partnership, but a private corporation, responsible for the conduct of its agents in the ordinary course of managing the establishment.¹

§ 280. **Who are Guests; Circumstances considered.**—2. Who are guests? For the relation of innkeeper arises with reference only to such parties as the law denominates guests. One who keeps a public house may, not inconsistently, carry on a restaurant, cater for a select company, serve liquors at a bar;² keep a shaving saloon, or permit outside parties to get up a ball on his premises;³ and, as to strangers who avail themselves of such extraneous service, he is no innkeeper at all. So, too, is it settled beyond cavil that one whose status is innkeeper towards the general public may, by virtue of special arrangement with individuals who come to remain for some length of time, become in effect no more, as concerns them, than the keeper of lodgings or a boarding-house.⁴ And an innkeeper may stable one's horse on peculiar terms with the owner, the latter not stopping at the inn, so as to exclude the liability of strict innkeeper for the animal.⁵ Patrons like these are not legally his guests, nor is he legally their innkeeper.

Yet one might be a guest, though not calling for a room, nor registering his name, if the circumstances showed that he was accepted *infra hospitium*, and partook of the inn entertainment in due course as a transient comer, though not

¹ Dixon v. Birch, L. R. 8 Ex. 135.

² Queen v. Rymer, 2 Q. B. D. 136; Fitch v. Casler, 24 N. Y. Supr. 126.

³ Carter v. Hobbs, 12 Mich. 52; Coykendall v. Eaton, 55 Barb. 188.

⁴ Wiser v. Chesley, 53 Mo. 517; Cross v. Wilkins, 43 N. H. 332; Johnson v. Reynolds, 3 Kans. 257; Lawrence v. Howard, 1 Utah, 142; Pollock v. Landis, 36 Iowa, 651; Vance v. Throckmorton, 5 Bush, 41; Hall v. Pike, 100 Mass. 495.

⁵ Ingallsbee v. Wood, 33 N. Y. 577; Mowers v. Fethers, 61 N. Y. 31; McDaniels v. Robinson 28 Vt. 387; Mason v. Thompson, 9 Pick. 280; Mealey v. Gray, 68 Me. 489. Cf. Mulliner v. Florence, 3 Q. B. D. 481.

intending to remain over night.¹ And the innkeeper's townsman or neighbor may be received into his inn as a guest, since distance is not now deemed material, notwithstanding the language of the old books, to constitute a traveller.² But doubtless an innkeeper's neighbor or friend, who may chance to cross the threshold and sit in the public room, is more readily presumed a caller rather, or special customer.³ His own guest's callers, and those who come to visit or dine with a guest at the latter's expense are not necessarily guests of the house.⁴ And where one, by avoiding to register, escapes the cost of becoming a guest, he cannot consider a hotel porter who does him a casual service as the innkeeper's representative in the bailment.⁵

§ 281. **The same Subject; Transients, Boarders, etc., distinguished.**—As between guests and the boarder or lodger, it is commonly true that the guest is entertained from day to day, as it were, coming and going as he pleases, being transient and having no bargain for a fixed time;⁶ while one who remains upon a special contract for a fixed time takes his place, more especially if a resident of the town, as boarder or lodger.⁷ Nevertheless (so closely do these distinctions run), it is expressly

¹ *Bennett v. Mellor*, 5 T. R. 273, where the right to be considered a guest is carried to an extreme point; *Read v. Amidon*, 41 Vt. 15.

² *Walling v. Potter*, 35 Conn. 183.

³ See *Story Bailm.* § 477; *Calye's Case*, 8 Co. 32; *Bac. Abr. Inns and Innkeepers*, C. 5.

⁴ *Gastenhofer v. Clair*, 10 Daly (N. Y.), 265.

⁵ See *Strauss v. County Hotel Co.*, 12 Q. B. D. 27 (distinguishing *Bennett v. Mellor*, *supra*), where the peculiar facts gave this complexion to the case. The plaintiff, whose baggage was lost, decided after entering the hotel which adjoined the railroad station, that he would not become a guest, but resume his journey when another train arrived. He left his baggage with the hotel porter, but by the time the train arrived, it was missing.

⁶ *Shoecraft v. Bailey*, 25 Iowa, 553; *Norcross v. Norcross*, 53 Me. 163; *Willard v. Reinhardt*, 2 E. D. Smith (N. Y.), 148.

⁷ *Bac. Abr. Inns and Innkeepers*, C. 5; *Story Bailm.* § 477; *Chamberlain v. Masterson*, 26 Ala. 371.

decided that the fact of one's agreeing with the innkeeper for reduced rates or an abatement of price by the week does not decisively convert him from guest to boarder,¹ especially if the arrangement to remain is contingent and uncertain; and State courts rule that a traveller, once received as a guest, does not cease to be such, by proposing to remain a given number of days, nor by ascertaining what price will be charged him for his accommodation, nor by paying in advance for a part or all of the entertainment, nor by paying cash for what he wants as those wants are supplied.² A man whose business takes him away from home might place his wife and children in an inn, to stay as boarders, while he, visiting them at rare intervals, would be of right a guest.³ It is said, too, that one may become a guest by procuring a room, and taking some of his meals at the inn, and lodging there part of the time.⁴

§ 282. **The same Subject; General Conclusion.**—To lay it down, on the whole, who should be deemed a guest in the common-law sense is not easy; and here the facts in any case must guide the decision. Commonly, such a party is the temporary sojourner who puts up at the inn to receive in due course its customary lodging and entertainment; and, so long as one keeps this transient character, he may well be so presumed. And yet the decisions show us that neither the length

¹ *Berkshire Woollen Co. v. Proctor*, 7 Cush. 217; *Beale v. Posey*, 72 Ala. 323; *Shoecraft v. Bailey*, 25 Iowa, 553; *Jalie v. Cardinal*, 35 Wis. 118; *Lusk v. Belote*, 22 Minn. 468. See this subject discussed in the case of an army officer, *Hancock v. Rand*, 24 N. Y. Supr. 279; aff. 94 N. Y. 1 (3 judges diss.).

² *Pinkerton v. Woodward*, 33 Cal. 557; *Jalie v. Cardinal*, 35 Wis. 118; *Hall v. Pike*, 100 Mass. 495; *Norcross v. Norcross*, 53 Me. 163.

³ *Lusk v. Belote*, 22 Minn. 468.

⁴ *McDaniels v. Robinson*, 26 Vt. 316, 334, per Redfield, C. J. *Curtis v. Murphy*, 63 Wis. 4, is a curious case, where the court held that one who registered at night, bringing a prostitute with him, was not, properly speaking, a guest. It would appear rather that the plaintiff's status in court was denied him as *contra bonos mores*.

of one's stay, nor his place of permanent abode, nor the distance he may have travelled, nor his final destination, nor any special modification of the inn rates, nor the method of payment, can alone conclude the question. But all such circumstances enter as material into the proof, as likewise would the amount of accommodation supplied, and the comer's means of knowing what distinction his host observes between house boarders or lodgers and guests.¹ One who is only an innkeeper is presumed to lodge and entertain guests alone. But, where an innkeeper is a victualler or bar keeper besides, or where he takes in both guests and boarders, the status of guest involves a careful consideration of all the circumstances.² Once again, a jury weighs all the facts; and most men will appreciate the present distinction, without being able to assign a governing test.

§ 283. **What Property is embraced under the Exceptional Bailment.** — 3. What property of his guest does an innkeeper's liability as an exceptional bailee cover? Undoubtedly an innkeeper, by the common law, is held responsible, in this capacity of exercising a public vocation, for whatever personal property of the guest the latter may have brought *infra hospitium*. Not only the guest's animals and private equipage may thus claim protection, his wearing apparel and personal jewelry, his baggage and travelling necessities, but, indeed, money and valuables to an unlimited amount.³ For, as the *Registrum Brevium* recited, innkeepers are obliged to keep "the goods and chattels" of their guests which are within their inns. And, among other things in the ancient *Calye's Case*, it is observed that, if one brings a bag or chest, &c., of evidences into the inn, or obligations, deeds, or other specialties, and, by default of the innkeeper, they are taken away, the innkeeper shall answer for them, and the writ shall be

¹ Hall v. Pike, 100 Mass. 495, and cases *supra*.

² Ib.

³ Armistead v. White, 17 Q. B. 261; Kent v. Schuckard, 2 B. & Ad. 803; Berkshire Woollen Co. v. Proctor, 7 Cush. 417.

bona et catalla generally ;” and the court adds that “these words *bona et catalla* restrain the latter words to extend only to movables.”¹

In centuries when travelling on the king’s highway was tortoise-like and beset with dangers, this rule of policy might not have ill-befitted the emergency ; but, to keep so intolerable a burden buckled on the backs of a respectable profession, in this age of civil order and rapid journeying, appears needlessly severe.² Responsibility for that of whose true nature and value we have no means of judging, and which is not wholly under our control, is the most oppressive of responsibilities. Common carriers are pronounced insurers only of what they understand to have been confided them for hire, and their custody is commonly exclusive ; carriers of passengers, the class most analogous to the present, must answer as insurers for baggage alone, inclusive of money, merely to such an amount as might be necessary or convenient for one’s journey ; but, to the innkeeper’s incidental risks, no such fair limits appear ever to have been placed by the common law.

§ 284. **The same Subject ; Rigor mitigated by Modern Legislation.** — Recent legislation, however, to which we shall presently recur, enables the innkeeper, in Great Britain and many parts of the United States, to curtail very properly his general responsibility for money and valuables, by requiring the guest to deliver these into his special custody ;³ while, upon the suggestion that the guest’s own imprudence has occasioned his loss, our courts have mitigated the rigor of the legal rule.⁴

¹ 8 Co. 33.

² See *Kellogg v. Sweeney*, 1 Lans. 397 ; s. c. 46 N. Y. 291 ; *Story Bailm.* §§ 470, 471, 481 ; *Jones Bailm.* 94 ; *Calye’s Case*, 8 Co. 32 ; *Bac. Abr. Inns and Innkeepers, C.* ; *Shoecraft v. Bailey*, 25 Iowa, 553 ; 2 *Kent Com.* 592–594 ; *Pinkerton v. Woodward*, 33 Cal. 557.

³ See *post*, as to an innkeeper’s liability and modern legislation.

⁴ *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515 ; *McDaniels v. Robinson*, 28 Vt. 387 ; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47 ; *Myers v. Cottrill*, 5 Biss. 465.

Nor is it unreasonable to suppose that an innkeeper might always have objected to receiving within his precincts goods and chattels of a guest, which he perceived to be injurious and offensive for such custody, or improperly secured, or such in kind, bulk, or value, that no traveller ought rightfully to make his host answerable for them.¹ But the option of an innkeeper to exclude or receive property brought by a guest is, of course, a dangerous principle to admit, and it cannot be freely exercised; while, in practice, persons of this profession in English-speaking countries almost universally accept, without objection or inquiry, whatever is brought.

The Louisiana Code wisely assimilates the case to that of the carrier of passengers, by declaring that an innkeeper's general liability shall extend to the guest's baggage and such sum of money as may be necessary for his expenses, according to his condition in life and the journey taken. Hence an innkeeper is not liable, in that State, for a large amount of gold stolen from the trunk of a guest who has made no express deposit thereof with him or his agents, nor given him or them notice that he had it.² In one or two other States, too, may be found decisions which, pursuing the same analogy, tend to confine, independently of statute, the innkeeper's liability to what is usually denominated "baggage;" but these instances are exceptional.³

§ 285. **Limits of Relation; Inn Precincts, etc.** — 4. We may further observe of the legal relation of innkeeper and guest which involves exceptional responsibility, that it has its fair and natural limits. This the reader may infer from what we

¹ See *Kellogg v. Sweeney*, 1 Lans. 397, 400; *Myers v. Cottrill*, 5 Biss. 465; *Queen v. Rymer*, 2 Q. B. D. 136; *Needles v. Howard*, 1 E. D. Smith, 54.

² *Simon v. Miller*, 7 La. Ann. 360; *Profiel v. Hall*, 14 La. Ann. 324.

³ See *Pettigrew v. Barnum*, 11 Md. 434; *Giles v. Fauntleroy*, 13 Md. 126; commented on in *Treiber v. Burrows*, 27 Md. 130. And see *Sasseen v. Clark*, 37 Ga. 242; *Maltby v. Chapman*, 25 Md. 310; *Taylor v. Monnot*, 4 Duer, 116; *Noble v. Milliken*, 74 Me. 225.

have already stated. Thus, there is a point at which the present bailment relation begins and a point at which it ends; so that before the innkeeping liability is assumed, or after it is legally divested, the innkeeper is simply an ordinary bailee, with or without recompense, as to any chattels of his bailor which he may then hold.¹ Of this principle, which comes up constantly in the law of common carrier, several illustrations are furnished in the reports; as if one intending to register should lose his property before the innkeeper recognized him as a guest;² or where a guest settles his bill, has his name checked from the register, and departs, leaving his trunk, valise, or other inanimate goods behind, to be called or sent for at his own convenience.³

So, too, it is for property of the guest *infra hospitium* or within the inn precincts to which the strict relation usually applies; though the vital point is whether the innkeeper holds possession in that capacity. Thus a guest's horse and carriage put up at the inn stable, or his cattle (if he be a drover), which are accepted on behalf of the inn, must be fed and lodged by the innkeeper in his public capacity.⁴ There may

¹ See *post*, § 298.

² See *Strauss v. County Hotel Co.*, 12 Q. B. D. 27; *post*, § 298. And as between things inanimate and animals, see *post*, § 296.

Whether an innkeeper may be liable as such before the guest actually arrives, see *post*, § 297; *Sasseen v. Clark*, 37 Ga. 242; *Dickinson v. Winchester*, 4 Cush. 114. Though good instances do not occur in the reports, there seems no doubt that property may be received by one as innkeeper in advance of the guest's arrival.

³ Here the innkeeper, if merely accommodating his late customer, is a gratuitous bailee and no more, for he expects no recompense. *Murray v. Clarke*, 2 Daly, 102; *Adams v. Clem*, 41 Ga. 65. Even where a guest pays his bill and departs, leaving his valise at the inn and intending to return at night and take up his relation anew, the innkeeper is not liable in that capacity if the valise be left. *Miller v. Peebles*, 60 Miss. 819; *Whitmore v. Haroldson*, 2 Lea, 312. *Aliter*, if the guest maintained his relation, and it was understood that he was chargeable during his absence. *Allen v. Smith*, 12 C. B. N. S. 638; 5 Barb. 560; *post*, § 298.

⁴ *Hilton v. Adams*, 71 Me. 19; § 297 *post*, and cases cited.

be stables, sheds, and outhouses forming part of the inn itself; and yet the inn precincts have their just limits. It is held, therefore, that an innkeeper who has a sea bathing-house, distinct from the hotel, for the convenience of his guests, is not liable in his public capacity for the goods and clothes they may leave there while taking a bath.¹

§ 286. **Innkeeper's Common-Law Responsibility for Personal Property of Guests; Common Carrier distinguished.** — With this preliminary investigation we are now prepared to ascertain what, at common law, is the innkeeper's bailment responsibility for the personal property of his guests brought to the inn. That this responsibility is extraordinary and exceptional cannot be denied; and yet we shall do well to keep it distinct from that of a common carrier, with which it is too often confounded. Public policy treats the two pursuits quite differently; and guests and consignors require different public protection.² In the law of innkeepers the custody of property is taken to be accessory to lodging and entertaining the owner; but a common carrier of goods contracts for and receives his reward directly upon each and all of the goods he takes; while even the passenger carrier, whose transportation of baggage is accessory, incurs no such extensive risks as the class now under notice. Carriage, too, regards diligence as to chattels in motion; but innkeeping, diligence as to chattels quiescent and seeking shelter. In the one case the bailor must, as a rule, part control and trust all to the bailee; while in the other he rarely fails to exercise a certain vigilance and supervision of his own, and is really tempted to keep the most valuable part in secret custody by himself; for which reason alone, the element of contributory negligence on the part of a guest at an inn is in much the closer combination. An innkeeper's exceptional responsibility, then, is rightfully viewed as something apart from that of all other vocations.

¹ *Minor v. Staples*, 71 Me. 316.

² See *Day, C. J.*, in *Fuller v. Coats*, 18 Ohio St. 343, 350.

§ 287. **The same Subject; Roman Law compared.** — The tendency of our jurists to confound carriers and innkeepers in respect of their exceptional bailment responsibility is due, doubtless, in part, to their juxtaposition in Roman law. A Prætorian edict, as the Digest shows, specified ship-masters, innkeepers, and stable-keepers as parties who alike must respond strictly for what they might have received for safety.¹ Roman edicts had much the force of a statute, though issued imperiously, like executive orders, to announce the rules which the magistrate intended to observe while in office.²

§ 288. **Standard of Liability at Common Law; Confusion in the Cases; Liability exceptionally Great.** — Strangely enough, the common-law liability of innkeepers is to this day deduced more from *dicta* than decisions; nor are these free from discrepancy. A certain class of cases, English and American, appear to hold, like the civilians, that an innkeeper may exonerate himself, in a case of loss, by showing positively that he was in no wise negligent; a rule which sinks this responsibility

¹ Dig. 4, 9, 1; Story Bailm. § 458; Colquhoun Rom. Civ. Law, §§ 1972, 1973. *Nautæ, caupones, stabularii*, are the parties specified in the Edict. *Nautæ*, of course, come under the designation of carriers; while *caupones* and *stabularii* refer to the class now under discussion. See *post*, Part VI. c. 1.

Caupo (as Colquhoun informs us, *supra*) was the keeper of a house of public entertainment for the reception of strangers and travellers, in which refreshments were supplied. Lodging, strictly speaking, was not included, although it must be inferred that *caupones* sometimes lodged travellers as in a *hospitium*. Horace (Sat. 1, 5, 4) may be quoted as authority for the fair supposition that the *caupona* was a sort of public house not always of good repute.

“*Inde Forum Appi*

Differtum nautis, cauponibus atque malignis.”

Stabularii were those who took in beasts of burden to feed or agist; and persons were likewise entertained in such places, especially those having charge of the animals; so that such houses were much like the English drovers' inns, or the khans of the East. Stable-keepers, as such, and disconnected from the inn business, have certainly no exceptional bailment responsibility at the common law.

² Colquhoun Rom. Civ. Law, § 1390.

to the minimum.¹ But another class emphatically declare the innkeeper to be an insurer of his guest's property, and liable whenever the loss is not occasioned by act of God, or a public enemy, or through the negligence of the guest or his servants; and this presses his responsibility to the maximum.² That an innkeeper may repel the presumption of liability by showing that the particular loss or destruction was due to natural and irresistible causes, or to the guest's own default, is certainly admissible; but the simple fact that the innkeeper and those under him were not in the least negligent proves, in many instances, no sufficient exoneration at our law. On the other hand are causes of loss which certainly would not excuse common carriers or a general insurer, and yet are by no means to be taken as conclusive against the innkeeper, at the present stage of our decisions. The more cautious, and apparently the more correct, statement is, that an innkeeper is bound to take extraordinary care, and that his responsibility approximates to insurance whenever the thing brought to the inn has been confided expressly or by implication to his care; and thus do some cases state it.³

But, as in the case of a common carrier, the innkeeper's legal responsibility transcends the measure of care and diligence, whether ordinary or extraordinary; for were he never so careful he is strictly answerable for loss in certain instances.

¹ *Dawson v. Chamney*, 5 Q. B. 164; *Story Bailm.* § 472; *Merritt v. Claghorn*, 23 Vt. 177; *Howe Machine Co. v. Pease*, 49 Vt. 477; *Johnson v. Richardson*, 17 Ill. 302; *Kisten v. Hildebrand*, 9 B. Monr. 72; *Howth v. Franklin*, 20 Tex. 798.

² *Richmond v. Smith*, 8 B. & C. 9, per Bayley, J.; *Morgan v. Ravey*, 6 H. & N. 277; *Day v. Bather*, 2 H. & C. 14; *Mason v. Thompson*, 9 Pick. 280; *Mateer v. Brown*, 1 Cal. 221; *Pinkerton v. Woodward*, 33 Cal. 557; *Hulett v. Swift*, 33 N. Y. 571; *Shaw v. Berry*, 31 Me. 478; *Norcross v. Norcross*, 53 Me. 163; *Sibley v. Aldrich*, 33 N. H. 553; *Shoecraft v. Bailey*, 25 Iowa, 553; *Manning v. Wells*, 9 Humph. 746. *Dawson v. Chamney*, *supra*, is severely criticised by Pollock, C. B., in *Morgan v. Ravey*, 6 H. & N. 277, and Bennett, J., in *Mateer v. Brown*, 1 Cal. 221.

³ *Weisenger v. Taylor*, 1 Bush, 275.

§ 289. **Standard of Liability at the Civil Law.** — The civilians appear to regard their innkeeper as in strictness responsible only where the loss was such as the greatest care on the part of himself and those under him might have prevented; obliging him simply to watch or cause to be watched with all possible diligence whatever the guest may have brought to the inn.¹ If, under their system, the innkeeper is made liable for everything brought *infra hospitium* by the guest, without qualification, yet this is to leave the liability, upon such a standard of reckoning, more like that of gratuitous borrower than an insurer.

§ 290. **Instances of Common-Law Liability stated; Acts of those about the Inn.** — For the acts of his domestics and servants about the inn, which occasion the loss or injury of a guest's goods and chattels, the innkeeper is responsible in damages, as for his own negligence or misconduct.² And this holds true as well of the wrongful or meddlesome acts, affecting such property, which fellow-guests, or the innkeeper's family, or others about the premises, not of the guest's own choosing, may have committed.³ So for any person whom the innkeeper leaves to officiate in his place during his own sickness or temporary absence, the innkeeper must, in general, respond, as though the harm were done by himself; for, as our old books declare, the duty and burden which the common law has enjoined upon innkeepers they cannot discharge themselves of, under pretence of sickness, want of understanding, or absence from their houses.⁴

¹ 1 Dom. Civ. Law, Pt. 1, B. 1, tit. 16, § 1; *supra*, § 274, *n*.

² *Day v. Bather*, 2 H. & C. 14; *Chamberlain v. Masterson*, 26 Ala. 371; *Weisenger v. Taylor*, 1 Bush, 275; *Rockwell v. Proctor*, 39 Ga. 105; *Pinkerton v. Woodward*, 33 Cal. 557.

³ *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *McDaniels v. Robinson*, 26 Vt. 337; *Cashill v. Wright*, 6 E. & B. 893; *Gile v. Libby*, 36 Barb. 70; *Dessauer v. Baker*, 1 Wilson (Ind.), 429.

⁴ *Bac. Abr. Inns and Innkeepers, C.*; *Rockwell v. Proctor*, 39 Ga. 105. This assumes that the innkeeper is an adult. *Ib*.

For thefts, therefore, of the guest's property brought *infra hospitium*, whether committed by a servant, a fellow-guest, or any one else about the inn, the innkeeper must be held strictly answerable.¹ And it affords him no legal excuse that he selected his servants with care, performed well his own duty, or guarded prudently against the mischief.² Where the guest's horse escapes from the inn-stables, or is stolen, the innkeeper is liable.³ And, in general, if the guest's property, deposited in any part of the inn or its precincts, be missing, this will be enough to make out a *prima facie* case against the innkeeper;⁴ from whom indemnity may be claimed, even though the true offender, one whom the innkeeper did not carelessly employ or admit, be seized as a criminal, and brought to justice.⁵

§ 291. **The same Subject; Acts of those from without the Inn.** — Now, to go by precedents, where the loss was occasioned by the act of persons from without the inn or its precincts, who were not employed or let in, we are not to affirm the innkeeper's unqualified responsibility so positively. For a burglarious entry, unaccompanied by violence and force, it would appear that the host is, in our law, chargeable as in the case of a common theft; and the reasoning of public policy, which closes upon an innkeeper every opportunity of criminal connivance at plundering his guests, would fairly

¹ Bac. Abr. Inns and Innkeepers, C.; Calye's Case, 8 Co. 32; Story Bailm. §§ 470-472; Cashill v. Wright, 6 E. & B. 893; Towson v. Havre de Grace Bank, 6 Har. & J. 47; Classen v. Leopold, 2 Sweeny, 705; Epps v. Hinds, 27 Miss. 657; Chamberlain v. Masterson, 26 Ala. 371; Lusk v. Belote, 22 Minn. 468; Bodwell v. Bragg, 29 Iowa, 232; Sasseen v. Clark, 37 Ga. 242. And see 1 Dom. Civ. Law, Pt. 1, B. 1, tit. 16, § 1.

² *Ib.*

³ Mason v. Thompson, 9 Pick. 280; Day v. Bather, 2 H. & C. 14; Howth v. Franklin, 20 Tex. 798; Sibley v. Aldrich, 33 N. H. 553.

⁴ Bennett v. Mellor, 5 T. R. 273; Richmond v. Smith, 8 B. & C. 9; Morgan v. Ravey, 6 H. & N. 277; Manning v. Wells, 9 Humph. 746; Clute v. Wiggins, 14 Johns. 175; McDaniels v. Robinson, 26 Vt. 337.

⁵ Cashill v. Wright, 6 E. & B. 893.

extend to it.¹ But the Code of Louisiana puts this proviso to the case of stealing: if not stolen by force and arms, or with exterior breaking of doors, or other extraordinary violence.² Whether our Anglo-Saxon innkeeper can ever thus exonerate himself, so as to show that a party who broke violently into the inn and took the guest's property was an utter stranger, and that he and his household were guilty of no complicity in the premises, nor careless, appears never to have been judicially passed upon; though the usual presumption against the innkeeper would probably be enough to hold him where circumstances made it impossible for him to furnish the countervailing proof.

At all events, we may conclude that our law subjects the innkeeper to an exceptional liability which approximates insurance for losses occasioned his guest by those about the inn precincts, and far transcends the usual rules of agency.

§ 292. **The same Subject; Forcible Robbery, Riots, etc.**—When we attempt to push our explorations still farther, we come to ground which the courts have scarcely trod. Civil analogies to support the position that the innkeeper is an insurer fail us, as of course; and investigation is not to be overborne by *dicta*. An innkeeper, so far as our published reports may be trusted, has never been really adjudged responsible for the loss of his guest's chattels, plainly occasioned by forcible robbery from without, to which neither negligence nor dishonor on the part of the innkeeper or those about the inn precincts contributed.³ Nor has he for injury,

¹ *Clute v. Wiggins*, 14 Johns. 175; *McDaniels v. Robinson*, 26 Vt. 317, 338; *Bennett, J., in Mateer v. Brown*, 1 Cal. 221. But see *Kisten v. Hildebrand*, 9 B. Monr. 74.

² *Woodworth v. Morse*, 18 La. Ann. 156.

³ See cases *supra*; *Pinkerton v. Woodward*, 33 Cal. 557; *Cutler v. Bonney*, 30 Mich. 259, 261, per Campbell, J. In *Pinkerton v. Woodward*, forcible robbery of the inn-safe, which contained the guest's gold, was set up in defence. But though the clerk had been knocked down by the

loss, or destruction of the guest's property, plainly occasioned by the irruption of mobs and rioters. Here, however, as before, we allow full force to the presumption of fault on the innkeeper's part or that of his household, and suppose him able on the proof to overcome it.

§ 293. **The same Subject; Loss by Accidental Fire.** — As to losses by accidental fire, there appears an obvious reluctance, in the few recent cases where the question has been considered, to pressing the innkeeper as the virtual insurer of all the property belonging to guests which happened to be in his house; thus distinguishing the innkeeper clearly from the common carrier. A New York decision, to be sure, applied rigidly to one innkeeper, some fifteen years ago, the common-carrier doctrine in this respect;¹ but the facts of the case showed nothing to rebut the usual presumption of blame against a host; and the court's harsh exposition of law was promptly met by an act of the legislature, declaring innkeepers exempt from liability for losses by fire, under like circumstances, wherever it should appear that the innkeeper was free from negligence, and the fire was the work of an incendiary.² The highest tribunals of several other States, on the contrary, without the aid of legislation at all, have expressly declined to treat the innkeeper as insurer of his guest's property against accidental fires occasioned by neither the innkeeper's own negligence or default, nor that of servants or members of his household.³

alleged robbers, it appeared that the safe had not been properly locked; a fact deemed decisive against the innkeeper.

¹ *Hulett v. Swift*, 33 N. Y. 571. Cf. *Ingallsbee v. Wood*, 33 N. Y. 577, which refuses to extend this doctrine to another case, where an innkeeper's liability seemingly existed, by denying that there was such relation. And see *Mowers v. Fethers*, 61 N. Y. 34; *Faucett v. Nichols*, 64 N. Y. 377.

² See *Faucett v. Nichols*, 64 N. Y. 377.

³ *Merritt v. Claghorn*, 23 Vt. 177; *Cutler v. Bonney*, 30 Mich. 259; *Vance v. Throckmorton*, 5 Bush, 42. And see (under statute) *Burnham v. Young*, 72 Me. 273.

§ 294. **The same Subject; Cases of clear Immunity.** — We may add that it is nowhere pretended that an innkeeper's liability extends to losses occasioned by act of God or a public enemy; not even common carriers being reckoned insurers to such an extent.¹ If the guest's property perish, spoil, or receive harm while within the inn or its precincts, the innkeeper may be presumably deemed responsible therefor; but he may show that this was due to some natural cause which he or his servants could not have prevented, or to the guest's own default, or, perhaps, to accidental fire or force from without, for which none of his household was to blame. Thus, injury or death to the guest's horse would *prima facie* charge the innkeeper, who has immediate charge of the animal;² and yet he cannot be charged, where he shows that the animal died a natural death.³ If, moreover, as we shall contend hereafter, the common carrier is excused for acts of public authority, as well as for the fault of his customer, occasioning the loss, so likewise should be the innkeeper.

§ 295. **The same Subject; Liability where actually Negligent.** — For loss or destruction of the guest's property, which imputes actual negligence or want of ordinary care to the innkeeper or his servants, all the more clearly will the innkeeper be held answerable. Thus, if the guest's horse should sicken or die from want of proper food, shelter, or attendance, or escape while insecurely fastened, or get hurt while badly driven by those in the innkeeper's service, the innkeeper must respond.⁴

¹ See Common Carriers, *post*; Plowd. 9 *b*; Bac. Abr. Inns and Innkeepers, C.

² Calye's Case, 8 Co. 32; Shaw v. Berry, 31 Me. 478; Day v. Bather, 2 H. & C. 14; Sibley v. Aldrich, 33 N. H. 553; Hill v. Owen, 5 Blackf. 323; Seymour v. Cook, 53 Barb. 451. But see Dawson v. Chamney, 5 Q. B. 161.

³ Howe Machine Co. v. Pease, 49 Vt. 477; Metcalf v. Hess, 14 Ill. 129; Thickstun v. Howard, 8 Blackf. 535.

⁴ Bac. Abr. Inns and Innkeepers, C.; Clary v. Willey, 49 Vt. 55; Dickerson v. Rogers, 4 Humph. 179; Day v. Bather, 2 H. & C. 14; Sibley v. Aldrich, 33 N. H. 553. See Dawson v. Chamney, 5 Q. B. 161.

So, too, where a house-check on the guest's baggage gets carelessly shifted, and the article is consequently delivered to the wrong person.¹ Or where the guest's carriage, or trunk, or money expressly confided to the landlord's special keeping, is not well secured or looked after. Or where the guest's room, in which his personal effects are kept, is without a suitable lock.² Putting strange guests together without their mutual assent, to occupy the same sleeping apartment, — a vile custom now happily obsolete in our best hotels, — is a culpable exposure of one's property to especial risks of loss, and an innkeeper who refuses to bed a guest otherwise when he has other vacant rooms in his house, may well be mulcted for it.³

§ 296. **Liability for Animals and Things inanimate compared.** — When one's horse, with or without the carriage, harness, and equipments, is committed to an innkeeper to be suitably cared for, the liability of innkeeper presumably attaches thereto, although the bailor be neither lodged nor entertained in the inn. This, at least, has been repeatedly affirmed under circumstances naturally conveying an impression that the owner of the horse had never been a guest, or else had terminated the relation.⁴ One reason commonly given for such a rule is, that the person who thus leaves his animal is constructively a guest.⁵ But another, which appears ample of

¹ *Coykendall v. Eaton*, 55 Barb. 188; *Murray v. Clarke*, 2 Daly, 102.

² *Bac. Abr. Inns and Innkeepers, C.*; *Jones v. Tyler*, 3 Nev. & M. 576; *Shoecraft v. Bailey*, 25 Iowa, 553; *Clute v. Wiggins*, 14 Johns. 175; *Pinkerton v. Woodward*, 33 Cal. 557.

³ *Gile v. Libby*, 36 Barb. 70; *Dessauer v. Baker*, 1 Wilson (Ind.), 429; *Olson v. Crossman*, 31 Minn. 222.

⁴ *Mulliner v. Florence*, 3 Q. B. D. 484; *York v. Grenagh*, 2 Ld. Raym. 866, Holt, C. J., *contra*; *Mason v. Thompson*, 9 Pick. 280; *McDaniels v. Robinson*, 316, 332. See *Ingallsbee v. Wood*, 33 N. Y. 577, which appears rightly decided on the facts, but wrongly on principle; the loss being by accidental fire. And see *Mowers v. Fethers*, 61 N. Y. 34; *Faucett v. Nichols*, 64 N. Y. 377.

⁵ *Mason v. Thompson*, and *McDaniels v. Robinson*, *supra*. But *Healey*

itself, and more natural, is, that an innkeeper who receives animals and equipage into the inn-stable is presumed to accept them as an innkeeper, and not a mere livery-stable keeper; for, though bound more closely as bailee in consequence, he thereby secures advantages, not the least of which is the common-law lien for his charges.¹ It would follow that, if the innkeeper had distinctly refused to take the horse other than as stable-keeper, unless the guest himself lodged at the inn, the above rule would not apply.² Quite in consonance with this latter view is the general doctrine, well avouched, that one who brings money, baggage, or other dead property into an inn from which no profit arises to the innkeeper, cannot charge the latter as such, where he takes neither lodging nor entertainment as a guest.³ Now, stabling was always a special charge, so that the innkeeper would be as well paid for his service whether the owner of the animal lodged with him or not; but quite the reverse as to money, baggage, and the like, whose acceptance for reward is exceptional, not customary. Nor can merely leaving a horse with the innkeeper give one the privilege of guest as to such dead property committed to the innkeeper's care besides.⁴

One may put up at an inn as guest while driving cattle, and thus make the innkeeper liable for the care of the animals.⁵

v. Gray, 68 Me. 489, argues against the right to hold an innkeeper liable as such, where the party leaving the horse is not himself a guest. Cf. 71 Me. 19.

¹ See *York v. Grenaugh*, *supra*; Bac. Abr. Inns and Innkeepers, C. A mere agistor or livery-stable keeper, as such, has no lien at the common law. *Supra*, § 122.

² *Mason v. Thompson* 9 Pick. 280. We have seen that the Prætor's Edict, at the Roman law, extended to *stabularii*. *Supra*, § 287.

³ Bac. Abr. Inns and Innkeepers, C.; Cro. Jac. 188; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *McDaniels v. Robinson*, 28 Vt. 387; *Grinnell v. Cook*, 3 Hill, 485; *Washburn v. Jones*, 14 Barb. 193. See *Bennett v. Mellor*, 5 T. R. 273; *Needles v. Howard*, 1 E. D. Smith, 54.

⁴ *McDaniels v. Robinson*, 28 Vt. 387.

⁵ *Hilton v. Adams*, 71 Me. 19.

§ 297. **Liability for Chattels brought within the Inn Precincts, etc.** — This exceptional liability as innkeeper, of which we have at length discoursed, extends in general only to such personal property of his guest as may have been brought *infra hospitium*. And on the distinction between things in and out of the inn is founded this ancient saying of the common law, that, if one coming to a common inn to harbor orders his horse put to pasture, and the host does so, the host shall not be charged (unless for his own negligence occasioning the loss), if the horse be stolen;¹ though, if the horse were put to grass by the host of his own sole accord, he would have been responsible, for he thus made the pasture part of the inn precincts. Another good explanation of the difference, in point of liability, would be, however, that in the one case the guest's command rendered the host only a bailee for the special and unusual undertaking, while, in the other, the host must have dealt with his guest's property as innkeeper, or else as a wrong-doer.² So, where a traveller-guest ordered his horse taken to the stable, and said nothing about his gig, and the gig was left in the highway by the innkeeper with other carriages, the innkeeper was in one case held liable under an implied promise to take the gig *infra hospitium*.³ Apart, indeed, from that qualification of an innkeeper's liability which the guest's contributory negligence may occasion, or a failure to bail his property to his host at all (of which we shall speak presently) the innkeeper will become responsible as such from the moment the personal property reaches the reasonable possession and control of himself or his proper servants.⁴ It is enough that the guest, on arrival, puts his

¹ Bac. Abr. Inns and Innkeepers, C.; Calye's Case, 8 Co. 32; Hawley v. Smith, 25 Wend. 642.

² And, *semble*, for a loss in such case through the host's negligence, the guest must sue by special action and not on the custom of the realm as to innkeepers. Bac. Abr., *supra*.

³ Jones v. Tyler. 3 Nev. & M. 576.

⁴ Norcross v. Norcross, 53 Me. 163.

things in the place customarily used by incomers, or suffers the host's clerk, porter, or other suitable agent to take them in charge.¹ Whatever place may have been designated for the guest to leave certain articles in when he arrives, even though it be an open space near the highway, the guest has a right to assume that his host will see to further securing or guarding them.² And, where the innkeeper sends his carriage-driver or porter to a railroad station to solicit custom, he may become responsible for his guest's baggage from the moment the traveller confides it there to the driver's or porter's hands;³ though here, perhaps, it might be said that the innkeeper is sometimes bound for the safety of baggage rather as a passenger carrier. In short, it appears to be the bringing one's personal property as a guest into the host's lawful possession and control, that sets the liability of innkeeper in operation, rather than an active delivery into the host's personal custody, or even getting the things into the local confines of the inn.

§ 298. **When Liability as Innkeeper ends.** — The liabilities, together with the rights of an innkeeper, once actually attaching to his guest's personal property, these coexist as long as the relation itself lasts, unless by mutual consent the thing is sooner removed from the innkeeper's control and custody.⁴ The guest's occasional absence, *animo revertendi*, will leave the innkeeper, then, none the less answerable, provided the property remains, and there is nothing to show an intended change in their mutual relation.⁵ For the same reason, the

¹ *Rockwell v. Proctor*, 39 Ga. 105.

² *Jones v. Tyler*, 3 Nev. & M. 576; *Piper v. Manny*, 21 Wend. 282; *Newson v. Axon*, 1 McCord, 509. Cf. *Albin v. Presby*, 8 N. H. 408.

³ *Sasseen v. Clark*, 37 Ga. 242; *Dickinson v. Winchester*, 4 Cush. 114. See *supra*, § 285; also *Minor v. Staples*, 71 Me. 316, as to premises which are not to be considered precincts of the inn.

⁴ See 2 Kent Com. 592, 593; *Story Bailm* §§ 478, 479.

⁵ *Allen v. Smith*, 12 C. B. N. S. 638; *McDonald v. Edgerton*, 5 Barb. 560.

liability of innkeeper might possibly last beyond the time when the guest had paid his bill.¹ And, by undertaking to send his departing guest to the station, whence he may continue his journey, a host might, if not as protracting the inn relation, be, at all events, further liable for baggage as the carrier of a passenger.² But, after the relation once ceases, the innkeeper appears, properly speaking, liable only as an ordinary bailee, gratuitous or otherwise, for the inanimate goods his departing guest may have left in his care, unless strict proof be furnished of a different understanding.³

§ 299. **Remedies for Loss; Points of Practice.** — An action against an innkeeper for money, given his minor child to pay for necessaries, which was lost or stolen at the inn, may be brought in the name of the father as the true owner thereof;⁴ and the same holds true of personal clothing of an unemancipated infant, unless the usual presumption that ownership remains in the parent fails of application.⁵ So, if one's servant, travelling on his master's business with property of the latter, has been deprived of such property in such manner that the innkeeper becomes chargeable with the loss, the master will have the right of action, on the ground that he is absolute owner;⁶ and one's friend may, in this sense, be regarded as his servant.⁷ The agent of a corporation, engaged

¹ *Seymour v. Cook*, 53 Barb. 451. And see *Bendetson v. French*, 46 N. Y. 266.

² *Dickinson v. Winchester*, 4 Cush. 114; *Sasseen v. Clark*, 37 Ga. 242.

³ See *Murray v. Clarke*, 2 Daly, 102; *Adams v. Clem*, 41 Ga. 65; *supra*, § 285; *Miller v. Peeples*, 60 Miss. 819. If under such circumstances, therefore, the departing guest leaves valuables with the hotel clerk, to be kept without compensation until called for, the landlord, having no reason to suspect his clerk's honesty, cannot be held liable if the clerk embezzles the property. *Whitemore v. Haroldson*, 2 Lea, 312.

⁴ *Epps v. Hinds*, 27 Miss. 657.

⁵ *Dickinson v. Winchester*, 4 Cush. 114. And see *Watson v. Cross*, 2 Dav. 117. The general property of an infant brought to an inn may be sued for as his own. *Lusk v. Belote*, 22 Minn. 468.

⁶ *Bac. Abr. Inns and Innkeepers*, C.; *Cro. Jac.* 224; *Yelv.* 162.

⁷ *Ib.*

in its business, may in like manner render the innkeeper liable to the corporation for its corporate property, lost while in his custody.¹ Even a guest bringing bailed property into an inn renders the innkeeper answerable for its loss, once and for all, whether owner or bailee should sue him.² In all these cases the ground of liability appears to be, that notwithstanding the true owner may not have been lodged and entertained as guest, some one was, whether servant, agent, friend, or member of his family, in such a manner as entitles the innkeeper to his usual compensation out of the property. Consistently enough with this view do the old books intimate that where one rides to an inn a horse he has stolen, and the horse is there lost, the owner must pursue his remedy against the wrong-doer and not the innkeeper.³ But, generally speaking, it is the guest, or bailor, who sues.

§ 300. **The same Subject.**—A *prima facie* case is made out against the innkeeper on proof that one brought, as guest, certain property *infra hospitium*, which, on proper demand, was not restored to him; and the *onus* of exonerating himself devolves then upon the innkeeper.⁴ The guest's action for loss may be grounded in contract,⁵ or, at his option, in tort.⁶

¹ *Mason v. Thompson*, 9 Pick. 280; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417. And see *Bennett v. Mellor*, 5 T. R. 276; *Towson v. Havre de Grace Bank*, 6 Har. & J. 47; *Coykendall v. Eaton*, 55 Barb. 188.

² See *Shaw, C. J.*, in *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Kellogg v. Sweeney*, 1 Lans. 397.

³ Roll. Abr. Inns, 30; Bac. Abr. Inns and Innkeepers, C.

⁴ *Wiser v. Chesley*, 53 Mo. 547; *Newson v. Axon*, 1 McCord, 509; *Hallenbrake v. Fish*, 8 Wend. 547; *Epps v. Hinds*, 27 Miss. 657. Judgment rendered for lost gold should be payable in gold or its equivalent. *Kellogg v. Sweeney*, 46 N. Y. 291; *Pinkerton v. Woodward*, 33 Cal. 557.

⁵ *Rockwell v. Proctor*, 39 Ga. 105. As to the evidence admissible in such suits, see *Mateer v. Brown*, 1 Cal. 221; 11 Mo. 230.

⁶ See remedies discussed in the corresponding bailment to the common carrier, Part VI. c. 8. Agreeably to the practice in many States, a loss by the guest may be set off against the innkeeper's bill for entertainment, and *vice versa*. See *Classen v. Leopold*, 2 Sweeney, 705.

§ 301. **Innkeeper's Exoneration at the Common Law.**—But now as to the innkeeper's exoneration at common law; a means of defence not readily reduced to rule, though all will concede that, under favoring circumstances, the innkeeper may throw the blame for loss of the guest's chattels back upon the guest himself, and so stand acquitted of liability. We may suppose his exoneration reducible to these two main heads: (1) act of guest; (2) excusable loss on his own part. But the first head is commonly subdivided in treatment, as we proceed to show; signifying throughout, however, that the proximate cause of loss was the bailor's act or conduct. What complicates the present bailment is, that there is almost always a mixed custody of property brought to the inn, both bailor and bailee participating.

§ 302. **The same Subject; Custody not confided to the Innkeeper.**—1. The innkeeper may exonerate himself by showing that the guest took upon himself the exclusive custody of the property, or, at least, did not confide it to his host; as by committing it to his own servant, or companion, or so placing it that the innkeeper or his suitable representatives could have assumed no knowing control thereof. Such undue exclusion of the innkeeper appears where the owner of a loaded team puts it in a neighboring shed for shelter, making no request to the innkeeper to take charge of it;¹ or when a guest, of choice, intrusts his money and valuables to a fellow-lodger, or to some domestic plainly unfit to be styled the innkeeper's agent for that purpose;² or knowingly disobeys plain and reasonable directions of the establishment as to where the thing should be put;³ or allows another person to exercise such acts of ownership over his property as induces the just belief that the third person is the owner;⁴ or, in general,

¹ *Albin v. Presby*, 8 N. H. 408.

² *Houser v. Tully*, 62 Penn. St. 92.

³ *Purvis v. Coleman*, 21 N. Y. 111; *Fuller v. Coats*, 18 Ohio St. 343.

⁴ *Kelsey v. Berry*, 42 Ill. 469.

reposes his confidence in strangers, and not in the host, or the host's suitable agents.¹

But equivocal conduct on a guest's part in this respect should not readily be interpreted into an exclusion of the innkeeper's responsibility; more especially if the host has, in fact, gained a legal control over the chattels sufficient for maintaining his lien upon them. And it is clear that delivery into the innkeeper's manual custody is not essential.² The guest may silently retain his money or valuables upon his person, or in his trunk, as one very naturally does, and yet by no means exclude the innkeeper's responsibility therefor.³ Baggage is in the innkeeper's custody, so as to charge him in that capacity, even though it be put into the guest's room; which, indeed, is the customary and proper place of reception for such effects as one wishes to wear. Nor is it incumbent upon a guest, at the common law, to tell the innkeeper what he has brought, or to ask him where his goods shall be put, or to charge him to keep them carefully; since every innkeeper ought to be circumspect on his own behalf. And whatever the careless place of deposit, about the inn precincts, where the host knowingly permits his guest's property, without protest, to remain, the innkeeper takes the risk, even though yielding reluctantly to the guest's express preference to keep it there. For it is the host's duty to point out the place where the guest's things shall be kept, and insist that his rule, if a reasonable one, shall be observed, as, otherwise, he will not answer for them.⁴

¹ *Sneider v. Geiss*, 1 Yeates, 34. And see *Vance v. Throckmorton*, 5 Bush, 41; *Story Bailm.* § 483; *Strauss v. County Hotel Co.*, 12 Q. B. D. 27.

² *Story Bailm.* § 479; *Jones v. Tyler*, 3 Nev. & M. 576; *Piper v. Manny*, 21 Wend. 282.

³ *Weisenger v. Taylor*, 1 Bush, 275; *Jalie v. Cardinal*, 35 Wis. 118; *Krohn v. Sweeney*, 2 Daly, 200.

⁴ *Richmond v. Smith*, 8 B. & Cr. 9; *Packard v. Northcraft*, 2 Met. (Ky.) 439; *Bodwell v. Bragg*, 29 Iowa, 232; *Epps v. Hinds*, 27 Miss. 658; *Kellogg v. Sweeney*, 1 Lans. 397. But see *Bendetson v. French*, 41 Barb. 31.

§ 303. **The same Subject; Chattels not bailed in Capacity of Guest.** — 2. Again, the innkeeper may exonerate himself by showing that the chattels were brought and kept or left in the inn by the guest in some other special capacity.¹ Thus, where a guest, who is a commercial traveller, carries his merchandise with him, and keeps it in the inn to show and sell off there, the host may not have to answer strictly for its safety; for one is under no obligation, as innkeeper, to furnish accommodations, on his premises, for trade and exhibition.² In such cases, if there be a bailment, it is a bailment with mixed custody. And so, too, as we have seen, where baggage or valuables are left by a departing guest, though here the bailee has exclusive custody.³

§ 304. **The same Subject; Guest's Contributory Negligence.** — 3. Want of ordinary care, or misconduct on the guest's part, such as must have contributed to the loss, or been its proximate cause, will, if made duly to appear, exonerate the innkeeper;⁴ and this on a broad principle whose operation extends to other kinds of bailment, those especially which involve a mixed custody.⁵ Such carelessness or misconduct must, of course, in order to exculpate the innkeeper, be clearly shown to have induced or occasioned the loss in question.⁶

¹ A guest who leaves his valise at the office without calling attention to it, so that the clerk, not knowing who the owner is, has it put into a baggage-room, does not charge the bailee as innkeeper. *Stewart v. Head*, 70 Ga. 449.

² *Bac. Abr. Inns and Innkeepers, C.*; *Burgess v. Clements*, 4 M. & S. 306; *Myers v. Cottrill*, 5 Biss. 465; *Mowers v. Fethers*, 61 N. Y. 34.

³ *Supra*, § 298. And see *post*, § 313.

⁴ *Classen v. Leopold*, 2 Sweeny, 705; *Chamberlain v. Masterson*, 26 Ala. 371; *Fuller v. Coats*, 18 Ohio St. 343; *Hadley v. Upshaw*, 27 Tex. 517; *Profflet v. Hall*, 14 La. Ann. 524; *Jalie v. Cardinal*, 35 Wis. 118; *Kelsey v. Berry*, 42 Ill. 469.

⁵ See this subject enlarged upon in the case of a common carrier, Part VI. c. 4.

⁶ *Cashill v. Wright*, 6 E. & B. 891; *Burrows v. Trieber*, 21 Md. 320. The rule is laid down by Erle, J., in *Cashill v. Wright*, *supra*, to the effect that, in such cases, "the goods remain under the charge of the inn-

This plea of contributory negligence or misconduct can afford a host no advantageous cover for his own remissness of duty; and, in the embarrassing cases of mixed custody which so frequently come up for adjudication, the drift of authority is to the guest's side. Not only ought an innkeeper to furnish for his guests secure apartments, which may be locked or bolted inside, but he should not, day or night, relax his vigilance over outer halls, passages, and other means of access. Hence, the fact of giving the guest a key to his room, an act which of itself imports no intended exclusion of the host's general supervision of his inn premises, will not commonly relieve the innkeeper of liability for losses occasioned while the guest sleeps with his door unlocked.¹ Nor, in general, is a guest to be pronounced negligent or a contributory to his own loss, for failing to hand over his money and valuables to the innkeeper's personal custody; and this, notwithstanding he knows there is an iron safe in the inn provided for that purpose;² for it is common prudence, not carelessness, that indisposes men to trust what is precious out of their personal sight and reach; and personal convenience is an element besides. Not even the guest's intoxication, so that he does not hear the thief in his room, will exonerate the host, whose duty it is to keep thieves out;³ though intoxica-

keeper, and the protection of the inn, so as to make the innkeeper *liable as for breach of duty, unless the negligence of the guest occasions the loss in such a way as that the loss would not have happened if the guest had used the ordinary care that a prudent man may be reasonably expected to have taken under the circumstances.*" And see *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515.

¹ *Morgan v. Ravey*, 6 H. & N. 265; *Calye's Case*, 8 Co. 32; *Classen v. Leopold*, 2 Sweeny, 705; *Newson v. Axon*, 1 McCord, 509; *Mitchell v. Woods*, 16 L. T. N. S. 676; *Lanier v. Youngblood*, 73 Ala. 587; *Murchison v. Sergeant*, 69 Ga. 206.

² *Johnson v. Richardson*, 17 Ill. 302; *Jalie v. Cardinal*, 35 Wis. 118; *Weisenger v. Taylor*, 1 Bush, 275; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417.

³ *Walsh v. Porterfield*, 87 Penn. St. 376.

tion contributing to the loss should debar the guest from recovering.¹

Still, the hardship of thus loading down a pursuit indispensable to the community, and yet not found specially attractive because of either immense rewards or the social distinction it confers, in order that a somewhat antiquated rule of policy shall be consistently enforced, is recognized, not only in current legislation, but in our most recent decisions, independently of it. Knaves never cease to abound; but their prevailing methods in modern England and the United States are more sly and cunning than in the days when a highwayman boldly presented his pistol, and demanded surrender; nor, in our civilized communities, should innkeepers be readily suspected of playing into the hands of such parties. Inns, too, at our large centres may lodge hundreds of strangers under one roof, and an immense amount of property; so that, to mark well the traits of individual guests, as in the ancient rural hostelry, would be impossible, even were the host to give his whole time to the study. An increasing watchfulness for his own, then, may not unfairly be asked of the guest under this changed aspect of the relation. We find, therefore, that the latest English decisions, admitting that the guest's failure to leave his chamber door locked will not dispense with the host's vigilance, yet allow this circumstance, in connection with others imputing carelessness on the guest's part, to go to a jury as evidence of his contributory negligence.² In fact,

¹ *Ib.* The liability of an innkeeper for his guest's baggage is increased rather than diminished if the guest become intoxicated at the bar of the inn. *Rubenstein v. Cruikshanks*, 54 Mich. 199.

² *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515. In this case it was observed by Willes, J.: "The giving the guest a key, or giving a warning to lock his door, would certainly be a circumstance which might be urged in the innkeeper's favor. By omitting to lock his door, a jury might well think that the guest chose to take the risk of robbery upon himself, and that he ought to have taken more care. All these are

the modern and more reasonable doctrine is that such acts of the guest as failing to lock or bolt his door, or close a window, or his intoxication, may be considered by the jury and weighed with the other circumstances of the case.¹ And upon the whole, if the loss was substantially occasioned by the personal negligence of the guest, the innkeeper should not be answerable for it.²

§ 305. **The same Subject.** — The guest's careless exposure, so as to induce the loss complained of, may be alleged in

questions of degree when forming a judgment on the facts." *Ib.* p. 520. And Montague Smith, J., adds: "The law of *Calye's Case* may remain untouched. But the fact of the guest having the means of securing himself, and choosing not to use them, is one which with the other circumstances of the case should be left to the jury. The weight of it must, of course, depend upon the state of society at the time and place." *Ib.* p. 522. See also *Cashill v. Wright*, 6 E. & B. 891. *Herbert v. Markwell*, 45 L. T. N. S. (Q. B.) 649; *aff. W. N.* (1882) 112, confirms this rule.

Where a guest, arriving at a hotel in New York city, kept in his private room two thousand dollars in gold coin, instead of leaving it for deposit in the office safe, as he knew the rule of the house requested him to do, he was recently held fairly to blame for its disappearance. *Purvis v. Coleman*, 21 N. Y. 111. But, while the unusual bulk or value of the property might here be worth considering, as contrasted with things needful about one's person, and not very costly, like clothing, a watch, or pocket-money, which a guest should not be expected to surrender, the innkeeper's ground of exoneration seems here to have been substantially the guest's non-compliance with a positive and reasonable requirement. See *Classen v. Leopold*, 2 Sweeny, 705. A New York statute, too, may be deemed decisive of *Purvis v. Coleman*, *supra*. And see *Fuller v. Coats*, 18 Ohio St. 343; *Read v. Amidon*, 41 Vt. 15.

¹ *Herbert v. Markwell*, *supra*. See *Murchison v. Sergent*, 69 Ga. 206; 10 Mo. App. 235. If no notice was posted cautioning guests to lock their doors, etc., or the reverse, this is a circumstance worthy of consideration by a jury. The mere omission of a guest to inform the innkeeper that there was no lock on the door is not negligence, as a matter of law, on his part. *Lanier v. Youngblood*, 73 Ala. 587. As to the guest's omitting to close a window, see *Bohler v. Owens*, 60 Ga. 185.

A guest is not chargeable with negligence in consenting to occupy a room with a stranger guest, by whom his goods were stolen. *Olson v. Crossman*, 31 Minn. 222.

² *Elcox v. Hill*, 98 U. S. 218.

proof of his contributory negligence; as where one displays the valuable contents of his box in a public room before strangers, and afterwards leaves the box there.¹ Other circumstances might suggest culpable carelessness or misconduct in the guest; such as pulling his things loosely about; leaving trunks unfastened, or precious jewels scattered round while absent, so that the honesty of others having access is tempted; getting drunk; or actively attempting to corrupt the honor of the inn servants.² Nor does it follow, because a guest may leave his door unlocked with impunity while in the room, that he is equally blameless for going out without turning the key upon his property.³ Single circumstances like these may not be legally conclusive against the guest's right to recover for a loss, but they bear materially upon the question of the innkeeper's exoneration in a given case, where contributing to the loss.

A guest who brings chattels to an inn, peculiarly liable to do mischief, or to waste, perish, or escape, ought to bring the fact to his host's knowledge, so that proper precautions may be taken. Thus, if an animal, having a singularly vicious trick, escapes or perishes in consequence, the guest may have to bear his own loss, for not duly warning the innkeeper.⁴

§ 306. **Exoneration by Reason of Excusable Loss.** — The other main ground of exoneration⁵ is, that the loss or damage was excusable to the innkeeper. This subject we have already sufficiently discussed;⁶ leaving these special modifi-

¹ *Armistead v. Wilde*, 17 Q. B. 261; *Cashill v. Wright*, 6 E. & B. 895; *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515.

² *Chamberlain v. Masterson*, 26 Ala. 371.

³ But see *Buddenburg v. Benner*, 1 Hilt. (N. Y.) 84.

⁴ *Healey v. Gray*, 68 Me. 489.

⁵ *Supra*, § 301.

⁶ *Supra*, §§ 290-296. To attempt to reconcile all that English and American courts have said concerning an innkeeper's liability for property of guests brought within the inn would be a hopeless task. But at this stage, some such statement as the following may be thought to bring the

cations of common-law responsibility which contract, usage, or legislation introduces, to be presently stated.

§ 307. **Innkeeper's Liability holds, though he be not Licensed.** — The fact, we may add, that one occupying the relation of innkeeper has not taken out an innkeeper's license cannot be set up to exonerate him from liability for loss of his guest's property.¹

§ 308. **Special Qualifications of Innkeeper's Responsibility.** — We now inquire to what extent the common-law liability of an innkeeper for property intrusted to the inn may be specially qualified. These may be briefly stated under the heads of (1) special contract, (2) custom, and (3) legislation.

§ 309. **The same Subject; by Special Contract.** — 1. The right of mitigating this responsibility by special contract with the particular guest receives, thus far, but slight

decisions into just harmony. The common-law policy aims to promote the comfort and security of guests at an inn, by holding the innkeeper responsible as extraordinary bailee of the guest, for such property as the latter may have brought *infra hospitium*, to the extent of loss or damage occasioned by the negligence or misconduct of the innkeeper himself, or that of his servants and his family, and apparently of other guests and all such parties as he may have admitted upon the premises. As to these he is deemed an insurer, in which sense he cannot set up their want of authority from him, or even his non-contribution to their wrongful acts, to screen himself from the consequences of loss occasioned the guest. But, beyond this, he is answerable only so far as he or they may have contributed, by ordinary negligence or wilful misconduct, to such loss or injury as is occasioned by those from without the inn precincts, as by rioters, genuine burglars, forcible robbers, and the like; and the same as to losses caused by accidental fire, or by the act of God or a public enemy. Yet the presumption is against the innkeeper whenever a loss occurs; so that if it be by persons not admitted, but forcing their way into the house, the burden is upon him of showing this. The innkeeper may exonerate himself by showing that the guest himself was at fault, or excluded him from custody, and so contributed to the loss; and special contract, custom, and legislation may afford him special exoneration in a certain measure, or in some particular respect.

¹ *Dickerson v. Rogers*, 4 Humph. 179. And see *Atwater v. Sawyer*, 76 Me. 539.

attention from our courts; yet, if analogies can serve us, they tend plainly to the conclusion that any innkeeper may make a qualified or limited acceptance of his guest's property;¹ though not, in America at least, to the extent of divesting himself of all responsibility for the acts of servants, fellow-lodgers, or others about the inn, nor certainly so as to excuse misconduct or the want of ordinary care on his own part.² If legally liable at all for losses occasioned by riot, accidental fire, or forcible robbery, while he and those under him were free from actual blame, an innkeeper may probably protect himself against such risks by special stipulation to that effect. But it is doubtful whether the common rule can be greatly modified in his favor; for, to quote an old authority, he who takes on himself this public employment shall not only answer for his own neglects, but also for the neglects of those who act under him, "though he should expressly caution against it;"³ and it is certain that public policy places bounds, not yet well defined, which must not be transcended.

§ 310. **The same Subject; Reasonable Rules, etc.** — Reason and modern policy, however, unite in conceding to innkeepers, in consideration of the extensive liabilities they incur incidentally to furnishing entertainment, the right to make reasonable rules and regulations as to the place where the guest shall make deposit, by way of defining, as it were, their liability. To such requirements, unless waived, the guest must conform; and his actual knowledge, that the landlord refuses otherwise to hold himself absolutely responsible for the property, amounts usually to a special contract between the parties, that the risk shall so run. But the rule must be reasonable

¹ Cf. rule as to Carriers in this respect, *post*, Part VI. c. 5.

² See *Yorks Co. v. Central Railway*, 3 Wall. 107; *Carriers*, *post*, Part VI. c. 5.

³ *Bac. Abr. Inns and Innkeepers*, C.; *Lane v. Cotton*, 1 Salk. 18, per Holt, C. J.

in itself; as, for instance, one requiring the deposit of money and valuables, not needful on one's person, with the innkeeper himself;¹ or of the hats, overcoats, and umbrellas of guests while taking their meals, in a certain convenient place;² while, on the other hand, it would be unreasonable to insist that one's own watch, indoors apparel, or pocket-money, be so deposited.³ To this extent special qualification of an innkeeper's liability has the sanction of an ancient case, where it was said that if the host require his guest to put his goods in such a chamber, under lock and key, and that then he will warrant their safety, else not, and notwithstanding the guest suffer them to lie in an outer court, where they are stolen, no action lies against the host.⁴

Nor should we forget that an innkeeper's special acceptance of property, and his rules and regulations derogatory of the common law, however reasonable of themselves, have no force independently of the guest's express or implied assent. Hence it is held insufficient that the host has merely posted his restrictive notice in the guest's room;⁵ or that the guest has entered his name on a hotel register, under a printed heading of inn requirements.⁶ Mutual assent is an essential element to the intended qualification of liability; and the guest must appear to have understood, and by his conduct

¹ *Purvis v. Coleman*, 21 N. Y. 111.

² *Fuller v. Coats*, 18 Ohio St. 343; *Read v. Amidon*, 41 Vt. 15.

³ See *Pollock, C. B.*, in *Morgan v. Ravey*, 6 H. & N. 265, 271; *Pinkerton v. Woodward*, 33 Cal. 557. *Semble*, that a rule requiring that all articles left in a certain place (where for convenience the guest must leave them) are at the owner's risk, is unreasonable: *e. g.* hats, etc., where one enters the dining-room, on the racks provided by the innkeeper.

⁴ *Spencer's Case*, *Dyer*, 266. But (as it is added in *Bac. Abr.*), in *Moor*, 78, 158, the same point seems to be held otherwise. *Bac. Abr. Inns and Innkeepers, C.*

⁵ *Morgan v. Ravey*, 6 H. & N. 265; *Pinkerton v. Woodward*, 33 Cal. 557; *Bodwell v. Bragg*, 29 Iowa, 232.

⁶ *Bernstein v. Sweeny*, 33 N. Y. Super. 271; *Milford v. Wesley*, 1 Wilson (Ind.), 119.

have assented to become bound thereby.¹ As inns are commonly conducted, it rarely happens that a guest gains an opportunity to know and object to special terms before he has been shown to his private apartment, and entered so far upon the relation that to sever it at once might deprive him of needful food, rest, and shelter, and put him to disadvantage; a circumstance which is worth regarding in his favor.

§ 311. **The same Subject; Effect of Custom or Usage.**—

2. A local custom, not unreasonable in itself, and fairly within the purview of both parties, may somewhat control the innkeeper's liability. Thus, general rules might be salutary at a large travelling centre, and in an immense hotel, for the better security of property brought within the house, which would seem vexatious when applied to a small rural inn.² No custom, however, can prevail, when unreasonable in itself, or opposed to the express stipulation of the parties themselves;³ and the usage of a certain inn, which the guest is not shown to have in fairness understood, cannot be set up in derogation of his implied rights under the law.⁴

§ 312. **The same Subject; Statute Qualifications of Liability.**

—3. But statute qualifications of the innkeeper's liability prevail almost universally at this day, in England and America; showing that public opinion tends far towards exempting him from extraordinary risks. To some extent legislation of this character serves to shorten the radius of innkeeping responsibility; as in the New York act before adverted to, which aimed, in a measure, to exempt the innkeeper from losses by fire occasioned by no fault or negligence on his

¹ *Purvis v. Coleman*, 21 N. Y. 111; *Fuller v. Coats*, 18 Ohio St. 343; *Read v. Amidon*, 41 Vt. 15.

² See *Oppenheim v. White Lion Hotel Co.*, L. R. 6 C. P. 515, 522; *Albin v. Presby*, 8 N. H. 408.

³ *Stebbins v. Brown*, 65 Barb. 274.

⁴ *Berkshire Woollen Co. v. Proctor*, 7 Cush. 417; *Sasseen v. Clark*, 37 Ga. 242.

part;¹ and legislation directed against those who bring samples or merchandise for sale.²

But the English Innkeeper's Act of 1863, 26 & 27 Vict. c. 41, simply declares that no innkeeper shall be liable to make good to any guest any loss of, or injury to, goods or property brought to his inn, not being a horse or other live animal, to a greater amount than £30, except (1) where such goods or property shall have been stolen, lost, or injured through the wilful act, default, or neglect of such innkeeper or any servant in his employ; (2) where such goods or property shall have been deposited expressly for safe custody with such innkeeper; provided, always, that in the case of such deposit it shall be lawful for such innkeeper, if he think fit, to require, as a condition of his liability, that such goods or property shall be deposited in a box or other receptacle, fastened and sealed by the person depositing the same; and it is further made obligatory on the innkeeper to receive his guest's property under these conditions.³ The main object of this act being, then, not to exempt the host from liability for certain losses which dishonest fellow-guests and strangers might occasion, nor to require that a guest's effects, beyond a certain amount, shall remain at his own risk, but to enable the host to gather valuable property brought to his inn, where he can put his own guards upon it, such provisions much resemble the legislative enactments in many of our States, whose purport is, as under the Louisiana Code, to limit an innkeeper's responsibility for valuables brought to the inn by his guests, unless given into his special custody to be placed in the safe he

¹ See *Hulett v. Swift*, 33 N. Y. 571; *Mowers v. Fethers*, 61 N. Y. 34; *Faucett v. Nichols*, 64 N. Y. 377; *Supra*, § 293. This statute only exempts, in case of incendiary fires in barns or outbuildings of an inn, occurring without negligence on the innkeeper's part; and even here the burden of proof is put upon the innkeeper to discharge himself from liability. And see *Burnham v. Young*, 72 Me. 273.

² *Fisher v. Kelsey*, 16 Fed. R. 71.

³ Act 26 & 27 Vict. c. 41, §§ 1, 2.

has specially provided.¹ This is not to kill, but to cage the old responsibility. In order to avail himself of such advantages, the innkeeper (as these acts run), must post notices showing his intention and readiness to abide by the legislative provision;²

¹ The American statutes thus limiting the innkeeper's liability, usually specify certain kinds of property; as, for instance, money, jewels, and ornaments; but adding, it may be, the generic term "valuables."

In general, one's watch and chain in actual use need not be expressly delivered to the innkeeper under such legislation. *Bernstein v. Sweeny*, 33 N. Y. Super. 271; *Ramaley v. Leland*, 43 N. Y. 539; *Maltby v. Chapman*, 25 Md. 310; *Milford v. Wesley*, 1 Wilson (Ind.), 119. But under some of our local statutes, carelessly framed, the courts have felt compelled most reluctantly to hold to the contrary. *Stewart v. Parsons*, 24 Wis. 241; *Hyatt v. Taylor*, 42 N. Y. 259. As to whether money needful on the person would be included, see *Hyatt v. Taylor*, 51 Barb. 632; 42 N. Y. 259; *Maltby v. Chapman*, 25 Md. 310; *Krohn v. Sweeney*, 2 Daly (N. Y.), 200. The language of the statute should be resorted to in such questions. It is fair that an amount of money, reasonably prudent for contingencies, should be reserved by the guest, besides articles of apparel and jewelry in actual use, and wearing apparel; or what we might term baggage; and thus have such acts been sometimes construed. *Noble v. Milliken*, 74 Me. 225; *ib.* 77 Me. 359. All such legislation should be construed with a sensible reference to the common law which it modifies. 72 Ala. 323.

If the innkeeper has complied with the statute, and the guest has had sufficient opportunity to make the deposit, the innkeeper gains immunity for thefts from the guest's room, though the guest himself were not negligent. *Rosenplaenter v. Roessle*, 54 N. Y. 262. Unless the innkeeper was personally at fault, or his servants; this according to the language of the local statute. And see *Elcox v. Hill*, 98 U. S. 218; *Simon v. Miller*, 7 La. Ann. 360; *Woodworth v. Morse*, 18 La. Ann. 156.

But where the guest, being ready to depart, has packed his trunk, locked his room and delivered the key to the clerk to have the trunk brought down, the innkeeper becomes liable for valuables stolen at this time; for here the express deposit would be out of the question. *Benderson v. French*, 46 N. Y. 266; *Kellogg v. Sweeney*, 46 N. Y. 291. For the opportunity to leave one's property as the statute directs, consistently with his own interests, is presupposed in any rationally framed act of this kind.

² The English act (26 & 27 Vict. c. 41, § 3) requires the innkeeper to exhibit a copy of section 1, printed in plain type, in a conspicuous part of the inn-hall or entrance. Even the omission of a material word from the printed copy has been held a fatal variance from the statute requirement. *Spice v. Bacon*, 2 Ex. D. 463. See also *Mitchell v. Woods*, 16 L. T. N. S.

and for valuables thus expressly deposited with him, his liability continues as formerly.¹

§ 313. **Innkeeper an Ordinary Bailee where Public Vocation is not exercised.**— Wherever an innkeeper receives property from a party not entitled to charge him strictly in that capacity, or where, so to speak, he does not exercise that public vocation which infers a reward, his liability should be measured by the ordinary law of bailments. Thus, where one is received into the house out of charity, or for free entertainment, the innkeeper's liability for his property at the inn is no greater than that of any other bailee without recompense.² And so may it be where effects with no known guest or owner come into the innkeeper's custody.³ The same may be said of the innkeeper's liability for effects left unreasonably long, or even left at all, by a departing guest who has settled his bill; for here it may be assumed that the guest either forgot to take the property with him, or else intended making his late host a free depositary.⁴ But should circumstances favor the view that the innkeeper has received, or expects, special remuneration for his trouble, his liability in cases which exclude the exceptional standard of a public

676. But personal notice to the guest will suffice, as the corresponding acts of some of our States are construed. *Purvis v. Coleman*, 21 N. Y. 111. In other States the requirement of the act is not fulfilled by giving oral notice, and the innkeeper cannot contend that his guest had actual notice, without the posting, printing, etc., which the statute enjoined. *Olson v. Crossman*, 31 Minn. 222; *Lanier v. Youngblood*, 73 Ala. 587; 8 Mo. App. 21. Nor does a notice to deposit valuables, simply printed at the head of the register, suffice. *Olson v. Crossman*, 31 Minn. 222. And see *Murchison v. Sergeant*, 69 Ga. 206. Nor posting a notice on a single door. *Beale v. Posey*, 72 Ala. 323.

¹ *Wilkins v. Earle*, 44 N. Y. 172.

² *Queen v. Rymer*, 2 Q. B. D. 136; 1 Utah, 142; *Carter v. Hobbs*, 12 Mich. 52.

³ *Stewart v. Head*, 70 Ga. 449.

⁴ *Adams v. Clem*, 41 Ga. 65; *supra*, § 298; *Murray v. Clarke*, 2 Daly, 102; *Miller v. Peeples*, 60 Miss. 819; *Whitemore v. Haroldson*, 2 Lea, 312.

occupation would be that of hired bailee; and instead of slight diligence, he would be bound to ordinary diligence. And thus has it been ruled as to goods brought by a guest, and kept at the inn for special show and sale; an instance without the rule of public policy as concerning inns.¹

A vocation, resembling that of innkeeper, but not such, nor a public vocation at all, in point of exceptional responsibility, leaves those who exercise it liable on the usual bailment footing.²

§ 314. **Liability of Innkeeper as to Boarders.**—But the meagre precedents leave it still in doubt on what bailment footing an innkeeper shall stand towards boarders in his house who cannot claim the benefit of his public relation. The circumstances here disclosed, that there is lodging and entertainment of the person, which is to be paid for, and a *quasi* custody of dead property whose compensation is at the best but incidental, enhance the difficulty. Even admitting, too, that effects of the lodger or boarder are received in bailment upon an incidental compensation, and not gratuitously, our law does not yet plainly establish for what acts of one's servants, family, and third parties let into the bailment, so to speak, the hired bailee himself shall be answerable. Here lies the chief difficulty: whether there is more than a principal's liability for acts of agents and third parties. And once more, as we must remember, the bailment responsibility which public policy deduces from the fact that a guest's goods are brought *infra hospitium* is in a large degree constructive, and independent both of an innkeeper's assent to be bailee and his exclusive control of the thing.

¹ *Mowers v. Fethers*, 61 N. Y. 34; *Myers v. Cottrill*, 5 Biss. 465; *supra*, § 303. But see *Needles v. Howard*, 1 E. D. Smith, 54. See, further, *Mateer v. Brown*, 1 Cal. 221; *Carter v. Hobbs*, 12 Mich. 52; 16 Fed. R. 71.

² Sleeping-car companies, for instance. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

§ 315. **Lodging-house and Boarding-house Relation considered; English Rule.** — This legal dubiety beclouds the pursuit of lodging- and boarding-house keeping, whether carried on by itself, or in connection with an inn. "If a man upon a special agreement," say the old books, "boards or sojourns in an inn, and is robbed, the host shall not answer for it;"¹ but this apparently means, not that the host shall escape all liability for such acts, but that his liability falls far short of the innkeeping standard. In what position, then, stands a lodging or boarding house keeper to the property of the lodgers or boarders brought into his house?

Dansey v. Richardson is the leading English case in point; and there the conclusion reached was, that it is incumbent on a boarding-house keeper to exercise such care over the boarder's baggage as a prudent person would take of his own property. Upon the facts shown, there had been no express bailment of the boarder's effects to the keeper of the house; but the whole court ruled that the occupation itself implied a hired bailee's engagement to take due and proper care of a boarder's baggage.² But on the further question, whether a boarding-house keeper is answerable for his servant's negligence unless personally at fault, as in negligently selecting or keeping such a person, the court was equally divided.³ The loss appeared, in this case, to have been occasioned by the act of a house servant, who left the outer door carelessly open. In a later case, however, where it appeared that a thief was carelessly admitted into a lodging-house, the Court of Common Pleas refused to hold that one who lets furnished lodgings, without board, is under any implied obligation to take care of the lodger's goods, or responsible for

¹ Bac. Abr. Inns and Innkeepers, C.; Latch. 127.

² *Dansey v. Richardson*, 3 E. & B. 144.

³ *Ib.* Lord Campbell, C. J., and Coleridge, J., held that the servant's negligence was here the negligence of the employer; Erle, J., and Wightman, J., *contra*.

their loss.¹ Yet the facts of that case warranted no such denial of responsibility as to halls or other outer portions of a lodging-house which come peculiarly under the proprietor's control, and where a lodger's goods might happen to be deposited of right when the loss occurred.

§ 316. **The same Subject; American Rule.**—In this country, the distinction between boarders and lodgers has not been clearly taken; but it might prove available for discriminating in favor of those houses where one lets flats or apartments for private occupancy, without supplying food, drink, or other entertainment. As to boarders at an inn or a common boarding-house, however, it seems properly taken for granted that a bailment responsibility attaches for the effects of boarders brought into the house; though what its proper extent, authorities do not agree, except in regarding it as far less than that of innkeeper.² The better reason is with the late decision of a New York tribunal (not of last resort), which puts the general liability of boarding-house keepers, as did the earlier of the English cases, like that of an ordinary bailee for recompense; making it the duty of such a person to use such care, at least, of the boarder's baggage, as a prudent person would take of his own property, or to bestow the average care and diligence.³ And States whose legislatures have extended the innkeeper's lien to boarding-house keepers cannot consistently claim that the security and the risk should attach together as accessory to entertainment of

¹ *Holder v. Soulby*, 8 C. B. N. S. 254. Here the theft was of the lodger's goods from his private room. But in *Dansey v. Richardson*, *supra*, a boarder's baggage was stolen from an outer hall where he had rightfully put it when about to depart.

² See *Vance v. Throckmorton*, 5 Bush, 41; *Manning v. Wells*, 9 Humph. 746; *Lusk v. Belote*, 22 Minn. 468; *Chamberlain v. Masterson*, 26 Ala. 371.

³ *Smith v. Read*, 52 How. Pr. (N. Y.) 14; 6 Daly, 33. The forcible opinion of Loew, J., pronounced in this case, is worthy of attentive perusal. And see *Lawrence v. Howard*, 1 Utah, 142.

the person in the one case, and not the other. But some States certainly appear inclined to rule otherwise; for it has been more than once distinctly affirmed that the liability of an innkeeper for property expressly intrusted to his custody by a boarder, and placed in the office safe, is that of a depositary without reward for his trouble, whose obligation is merely to use slight diligence towards it.¹ Admitting the bailment responsibility to attach to certain property under such a relation at all, one can hardly escape the conclusion, that if loss or injury of a boarder's or lodger's property be occasioned by the culpable negligence of the house-servants, while acting within the scope of their employment, their employer must correspondingly answer as for his personal negligence; though other considerations might apply where the servant stole them.²

§ 317. **General Duties and Rights of Innkeepers.**— Having now finished our main topic, viz., that of an innkeeper's bailment responsibility, let us, before closing the present chapter, revert briefly to the leading duties and rights of innkeepers, apart from the guest's property.

§ 318. **General Duties of Innkeeper to Guest, etc.**— *First*, as to their duties. An innkeeper is bound, by our law, as a servant of the public, as one who exercises a public vocation, to lodge and entertain, to the extent of his accommodations, all suitable persons who may apply. And he cannot, if he has room enough in his house, refuse, on any pretence, to receive one as guest who tenders him his reasonable recompense

¹ *Wiser v. Chesley*, 53 Mo. 547; *Johnson v. Reynolds*, 3 Kans. 257. The novelty of the point at issue might well have justified a fuller exposition of the grounds whereon the decision rested than the court in either of these cases chose to make.

² *Smith v. Read*, 52 How. Pr. (N. Y.) 14; 6 Daly, 33. This accords with the common doctrine of master and servant as applied in our former chapters. The dissent of Erle and Wightman, JJ., on this point, in *Dansey v. Richardson*, 3 E. & B. 144 (see § 315), seems to have arisen from misapprehension of a cardinal rule of bailment law.

therefor, without rendering himself liable to the party in damages, and, perhaps, criminally indictable besides;¹ though it would be open to him to refuse his entertainment on any reasonable ground, as, for instance, that his house was full. Hence it affords no excuse for the innkeeper, at the common law, that the applicant was travelling on Sunday, or at an hour of the night after the innkeeper's family had gone to bed, or (as it seems) that the person declined to give his name and abode.² Nor can the innkeeper refuse to admit a married woman, or a minor, travelling alone, who is responsible and of good conduct; for, since proper lodging and entertainment are necessities as to such parties,³ not to speak of the innkeeper's lien, or the right to demand recompense in advance, he can suffer no detriment by such persons. Nor can an innkeeper refuse to receive one of a class because others of that class had misconducted.⁴ And the common law appears to concede, in theory, equal rights of lodging and entertainment to all, without distinction of class, or respect of persons.⁵ But it is reasonable excuse for an innkeeper to allege that the person came to the inn drunk, or behaved in an indecent or disorderly manner, or was an utterly disreputable or irresponsible person, or came to use the house for prostitution, and hence he was not admitted.⁶ Nor is the innkeeper bound to trust any one; but he may require his pay in advance;⁷ though, in an extreme case, a tender of the price by the

¹ Bac. Abr. Inns and Innkeepers, C.; 9 Co. 87; *Bennett v. Mellor*, 5 T. R. 274; *Hawthorn v. Hammond*, 1 C. & K. 404; Story Bailm. § 470; *Rex v. Ivens*, 7 Car. & P. 213.

² Bac. Abr. Inns and Innkeepers, C.; *Rex v. Ivens*, 7 C. & P. 213.

³ *Watson v. Cross*, 2 Duv. 147.

⁴ *Atwater v. Sawyer*, 76 Me. 539, applies this in favor of members of a militia company.

⁵ See The Civil Rights Bill, 1 Hughes, 541; *Lewis v. Hitchcock*, 10 Fed. R. 4.

⁶ Bac. Abr. Inns and Innkeepers, C.; *Rex v. Ivens*, 7 C. & P. 213; *Fell v. Knight*, 8 M. & W. 269; *Queen v. Rymer*, 2 Q. B. D. 136.

⁷ 9 Co. 87 *b*; Bac. Abr. Inns and Innkeepers, C.

applicant might, doubtless, be dispensed with as an idle formality.¹

An innkeeper having a livery stable is obliged, under similar qualifications, to receive one's horse and carriage brought thither for food and shelter.²

§ 319. **The same Subject.** — Again, the innkeeper is bound to provide for his guest's reasonable and proper accommodation in lodging and entertainment while the guest remains with him. But he is under no obligation to let the guest select his own room, nor to indulge him in unreasonable whims and caprices, to the annoyance and discomfort of others, and the peril of the host's just interests.³ If a guest's behavior prove offensive, outrageous, indecent, disorderly, or in defiance of the wholesome rules of the inn, or if he fails to pay his inn dues, the host may refuse on the spot to entertain him longer, and, if need be, turn him out.⁴

¹ In the course of a lucid opinion pronounced in *Rex v. Ivens*, 7 C. & P. 213, Coleridge, J., intimated his belief that, since innkeepers had come so universally to trusting their guests, a tender of money in advance would not be a prerequisite to the guest's maintaining suit or a prosecution for non-admission. He relied, however, in the case before him, upon the circumstance that the innkeeper had not objected to the guest's credit as a cause for not admitting him. In *Fell v. Knight*, 8 M. & W. 269, 276, Lord Abinger, C. B., doubted the correctness of the decision in this respect, expressing his own belief that a tender was needful before such a suit or prosecution could be commenced against the innkeeper. "It is not sufficient," he observes, "for the plaintiff to allege that he was ready to pay; he should state, further, that he was willing or offered to pay. There may be cases where a tender may be dispensed with; as, for instance, where a man shuts up his doors or windows so that no tender can be made; but I rather think those facts ought to be stated in the indictment or declaration."

² Bac. Abr. Inns and Innkeepers, C.

³ *Fell v. Knight*, 8 M. & W. 269. *Semble*, that a guest cannot insist on bringing dogs into a room in the inn occupied by other guests. *Queen v. Rymer*, 2 Q. B. D. 136.

⁴ *Ib.*; *Howell v. Jackson*, 6 C. & P. 723; *Commonwealth v. Mitchel*, 2 Pars. (Penn.) 431.

§ 320. **Duty as to others on Inn Premises.**—As for parties who come upon the inn premises, either by permission or intrusion, and who have no status as guests, lodgers, or boarders, the innkeeper stands towards them as would any one towards persons who seek to enter his private house or place of business;¹ though he should, we presume, be reasonably accommodating to those who call upon his patrons. And, as innkeepers are to so high a degree personally liable for thefts and other misdeeds committed by those who are admitted about the house, and lose pecuniarily when the house gets a damaged reputation, they ought not to be compelled to harbor drunkards, thieves, and vagabonds, nor permit even suspicious persons to range at freedom, but rather to keep such parties out altogether.²

§ 321. **Whether One may select his Guests, discriminate, etc.**—While a right of selecting his own guests does not befit the public character of innkeeper, and, as a rule, he has no right to exclude disagreeable persons further than we have just indicated, it seems that one may keep an inn for the entertainment only of a particular class of persons, provided such a plan be carried out consistently and with due publicity. Parke, B., has casually observed that a man might, for instance, keep an inn for those persons only who came in their own carriages;³ and one can well conceive of inns maintained exclusively for railway travellers, or for drovers, butchers, and market-men, or as an especial resort for invalids. And, on the ground that our law permits men to protect their own business interests against competitors, an innkeeper appears to be under no compulsion to entertain the agent of a rival inn, who would use this advantage to decoy away his customers.⁴

¹ *Ib.*

² See *Bac. Abr. Inns and Innkeepers, A.*

³ *Johuson v. Midland R.*, 4 Ex. 367, 371.

⁴ *Jencks v. Coleman*, 2 Sumn. 221, 226, per Story, J. A rival's false and injurious statements, to dissuade people from going to his inn, may furnish cause of action against him. *Bac. Abr. Inns and Innkeepers, B.*

Exceptions like these, however, are not to be extended so as to thwart public policy in its dealings with a public vocation. No innkeeper has the right to make his business subservient to other people's schemes; nor can he throw open his doors to the passengers and soliciting agents of one railway company, and shut them upon those of its rival.¹

But the keepers of boarding-houses, lodging-houses, and restaurants may, as a rule, select their own customers, and deal with mankind on the mutual footing, for theirs is no public employment, any more than that of bankers or the mercantile profession.

§ 322. **Innkeeper should refuse Guests when Health and Safety require it.** — Where there is an infectious disease, like small-pox, it is not only the innkeeper's right, but his duty, to shut out business while the danger lasts; and he may have to respond in damages to one whom he permits to become a guest under such circumstances, and who contracts the disease without being himself negligent.² And generally speaking, if the landlord knows the inn premises to be dangerous or unsafe for habitation from any cause, he ought to exclude the public and close the inn, so far as prudence may require, until the danger is removed.

§ 323. **Innkeeper's Liability for Assault upon Guest.** — For wanton and malicious assault committed upon the person of a guest during his stay, an innkeeper is not necessarily to respond in damages, though the act be done by one about the inn; for his strict charge as innkeeper concerns only bailment and the guest's chattels. But, within the usual limits of that rule which holds a master responsible for acts of a servant committed in the usual course and scope of employ-

¹ *Markham v. Brown*, 8 N. H. 523. And see *The Civil Rights Bill*, 1 Hughes, 541. The public vocation of common carrier or passenger carrier presents analogous instances. See *post*, Part VI. c. 3; Part VII. c. 1.

² *Gilbert v. Hoffman*, 66 Iowa, 205.

ment, he would have to answer,¹ as he undoubtedly must for his personal assaults.

§ 324. **Other Duties of Innkeeper ; Charges ; License, etc.** — Innkeepers should make no extortionate and unusual charges against their guests, nor supply them with unwholesome victuals and drink, or their animals with bad provender. Our Anglo-Saxon legislation has, from the earliest period, shown, in these and kindred particulars, a sedulous regard for the comfort and well-being of travellers.² Innkeepers must be licensed as such ; this being, however, a matter of municipal regulation commonly liable to change ; and the pursuit is no franchise, but a lawful trade, open to all who choose to pursue it ;³ nor does the want of a license affect one's legal obligations to the public.⁴ The keeping, too, of spirituous liquors at an inn may subject the host to the restraints of certain statutes, whose policy extends to those engaged in carrying on mere bar-rooms or restaurants ; but legislation of this character, which is purely local, fluctuates constantly, and we need not attempt to trace its course.⁵

§ 325. **Rights of Innkeeper ; Rules, etc.** — *Second*, as to the rights of innkeepers. Besides his qualified right, already adverted to, of refusing lodging and entertainment to ill-behaved and unsuitable persons, and of expelling from his house troublesome characters, the innkeeper has likewise power to prescribe salutary rules for the welfare of the establishment, and to properly interpret, in some degree, his own legal

¹ Calye's Case, 8 Co. 32; Bac. Abr. Inns and Innkeepers, C.; Wade v. Thayer, 40 Cal. 578; Commonwealth v. Mitchel, 2 Pars. (Penn.) 431; Story Bailm. § 481; Schoul. Dom. Rel. §§ 489-491.

² Bac. Abr. Inns and Innkeepers, C.; Cro. Jac. 609; Roll. Abr. 95; Duchman v. Hagerty, 6 Watts, 65.

³ Bac. Abr. Inns and Innkeepers, A.; Dickerson v. Rogers, 4 Humph. 179; 87 Penn. St. 168.

⁴ Atwater v. Sawyer, 76 Me. 539.

⁵ See Bac. Abr. Inns and Innkeepers, A.; 2 Kent Com. 596, 597, and notes; 11 Daly, 234.

responsibilities. Inn rules, however, should never subject one's guests to petty and humiliating discipline, nor defeat the policy which the law has set up for the comfort of those who come and go.

§ 326. **Right of Recompense; Lien, etc.** — But the right most pertinent to the situation is that of getting remuneration for the lodging and entertainment he furnishes. Not only may an innkeeper require to be paid in advance, and refuse to receive the penniless stranger into his rooms, but the law grants him, as security for unpaid charges, a lien upon all the movable property which the guest may have brought with him to the house and placed in the legal custody of the innkeeper as bailee.¹ Even where the thing belonged to a third person, and the guest himself had only a bailee's right therein, or was an agent for the owner, the innkeeper's lien will attach, provided only he received the property on the faith of the innkeeping relation.² But, if the innkeeper knew, when the thing came *infra hospitium*, that the guest neither owned nor hired it, nor brought it as the owner's agent, nor, in short, had any right to deposit it, he cannot detain the property against the true owner;³ and yet, if some proper charge were incurred against that specific chattel, the result might be different.⁴ Distinctions like these will apply to horses and other animals which are put up at an inn stable; for upon these an innkeeper has his lien,⁵ unless, indeed, it

¹ Proctor v. Nicholson, 7 C. & P. 67; Turrill v. Crawley, 13 Q. B. 197; Story Bailm. § 476; Snead v. Watkins, 1 C. B. N. S. 267; Alvord v. Davenport, 43 Vt. 30; Manning v. Hollenbeck, 27 Wis. 202; Dunlap v. Thorne, 1 Rich. (S. C.) 213. A piano so received may be subject to the innkeeper's lien. Threfall v. Borwick, L. R. 10 Q. B. 210; s. c. L. R. 7 Q. B. 711.

² Snead v. Watkins, 1 C. B. N. S. 267; Threfall v. Borwick, L. R. 10 Q. B. 210; Manning v. Hollenbeck, 27 Wis. 202; Berkshire Woollen Co. v. Proctor, 7 Cush. 417; Mowers v. Fethers, 61 N. Y. 34.

³ Broadwood v. Granara, 10 Ex. 417.

⁴ See Domestic Sewing-Machine Co. v. Watters, 50 Ga. 573.

⁵ Mason v. Thompson, 9 Pick. 280. *Supra*, § 296, shows that one is

should appear that he received the creature purely as an agistor.¹ Even were the animal borrowed or stolen by the bailor, food and shelter would be so clearly for the creature's benefit, that the innkeeper ought, if fairly receiving the creature in the honest exercise of his public employment, to be fully recompensed for his care and cost.²

In general, the innkeeper's lien will subject all personal property brought by a guest *infra hospitium*, animals inclusive, to the satisfaction of the host's bill against him.³ And this lien properly extends to effects brought by a minor, so far as to secure the host for necessities, or for money furnished the minor for necessities and used accordingly; assuming that the host has conducted himself honorably in the case, and not contrary to plain and proper directions of the parent or guardian.⁴ But, where several persons *sui juris* travel together and put up at an inn, the goods of one cannot be detained for the lodging and entertainment of all, but only for his share in the reckoning, unless he had agreed with the innkeeper to defray the expenses of his companions.⁵ Nor has the innkeeper any right to detain the person of a guest and the clothes he wears; for this would be a virtual imprisonment for debt without judicial process.⁶

assumed an innkeeper of horses rather than livery-stable keeper, independently of the strict relation of guest to the person bringing the animal.

¹ *Orchard v. Rackstraw*, 9 C. B. 698; *Saint v. Smith*, 1 Coldw. 51; *Grinnell v. Cook*, 3 Hill, 485; *Hickman v. Thomas*, 16 Ala. 666. See *supra*, §§ 122, 296. Although a mere agistor of cattle or livery-stable keeper has no common-law lien, as we have seen elsewhere, a lien is given by statute in some States. See *Young v. Kimball*, 2 Penn. St. 193; *Colquitt v. Kirkman*, 47 Ga. 555.

² See *Johnson v. Hill*, 3 Starkie, 172; *Domestic Sewing-Machine Co. v. Watters*, 50 Ga. 573; *Fox v. McGregor*, 11 Barb. 43.

³ *Story Bailm.* § 476; *Mulliner v. Florence*, 3 Q. B. D. 484.

⁴ *Watson v. Cross*, 2 Duv. 147. See *Proctor v. Nicholson*, 1 C. & P. 67.

⁵ *Clayton v. Butterfield*, 10 Rich. (S. C.) 300.

⁶ *Sunbolf v. Alford*, 3 M. & W. 248. It appears to have been anciently thought otherwise. See *Bac. Abr. Inns and Innkeepers*, D.; *Show*. 270.

§ 327. **The same Subject.** — The innkeeper's lien is not lost or waived by his guest's occasional absence from the inn, leaving his chattels behind;¹ nor because of any forcible or fraudulent dispossession thereof.² The taking of other security for his charges does not displace the lien, unless from his conduct in other respects this intent may be inferred;³ but he must take good heed not to let the property go wittingly and willingly or carelessly out of his keeping, lest he lose against other *bona fide* parties his security upon it.⁴ Where a horse is left in the innkeeper's custody, which the owner appears to have abandoned, a moderate use of the animal by the innkeeper may not be unreasonable, either for the health of the creature or by way of offset to the cost of its continuous keep.⁵

It is recently held in England, that (unlike the case of a pledgee) an innkeeper will lose his lien, and the practical benefit thereof, whenever he sells the guest's property to reimburse himself.⁶ Common-law methods for enforcing liens were always imperfect,⁷ so that recourse was had to chancery to afford relief; but the tendency of legislation at the present day is to aid an innkeeper, whose charges are unpaid, in permitting him to realize upon his security by a sale of the property at auction.⁸

Criminal statutes in these days are found which punish those who impose as guests upon an innkeeper. 28 Minn. 424.

¹ Allen v. Smith, 12 C. B. N. S. 638.

² Manning v. Hollenbeck. 27 Wis. 202.

³ Angus v. McLachlan, 23 Ch. D. 330.

⁴ 1 Schoul. Pers. Prop. §§ 385, 386; Perkins v. Boardman, 14 Gray, 481, 483.

⁵ Alvord v. Davenport, 43 Vt. 30.

⁶ Mulliner v. Florence, 3 Q. B. D. 484.

⁷ 2 Kent Com. 642; Pothonier v. Dawson, 1 Holt. N. P. 383; 1 Schoul. Pers. Prop. § 387; Fox v. McGregor, 11 Barb. 41; Case v. Fogg, 46 Mo. 44; Shaw, C. J., in Doane v. Russell, 3 Gray, 382. And as the old books note, even if the owner's horse "eat out the price of his head," the hostler cannot sell him; for one man is not authorized to sell and convey the property of another. Bac. Abr. Inns and Innkeepers, D.

⁸ 1 Schoul. Pers. Prop. § 387.

§ 328. **The same Subject.** — Irrespective of a lien, the innkeeper may, of course, sue for his recompense like any other creditor.¹ And where he is left in charge of the guest's effects in payment of his bill, he is held a mere gratuitous bailee for their safety;² and certainly his exceptional liability has ended.

§ 329. **Whether Boarding-house Keepers have Lien, etc.** — As for boarders, whether at an inn or a boarding-house, also mere lodgers, the common law recognizes no right of lien upon their effects in favor of the keeper of the house.³ But there are statutes now in force in many of the United States, which confer upon boarding-house keepers substantially the same privileges in this respect as innkeepers have enjoyed.⁴

¹ See *Classen v. Leopold*, 2 Sweeny (N. Y.), 705. An innkeeper may in the modern practice of various States recoup his inn charges against his guest's action for loss of property. *Ib.* And see *supra*, § 300.

² *Angus v. McLachlan*, 23 Ch. D. 330.

³ *Pollock v. Landis*, 36 Iowa, 651; *Hursh v. Byers*, 29 Mo. 469; *Ewart v. Stark*, 8 Rich. (S. C.) 423. But there might be a lien on a boarder's horse for its keep. See *Smith v. Keyes*, 2 Thomp. & C. 650.

⁴ U. S. Dig. 1st Series, Innkeepers, 31, 32; *Cross v. Wilkins*, 43 N. H. 332; *Jones v. Morrill*, 42 Barb. 623; *Bayley v. Merrill*, 10 Allen, 360; *Nichols v. Holliday*, 27 Wis. 406. But such statutes are not to be unduly extended by construction as to property of third persons. *Mills v. Shirley*, 110 Mass. 158. The words sometimes used are "baggage and effects" of a boarder. *Ib.*

PART VI.

EXCEPTIONAL MUTUAL-BENEFIT BAILMENTS.

COMMON CARRIERS.

CHAPTER I.

CARRIERS IN GENERAL.

§ 330. **Magnitude of the Present Topic; Common Carriage simply a Bailment.**—Our previous study has cleared the way for discoursing at length upon a final topic, included under the head of Bailments, which, in practical consequence to modern society and modern jurisprudence, overshadows all the others grouped together. The law of Carriers has not only become already of surpassing magnitude, but of surpassing intricacy; the keenest intellect of practitioners and the most profound wisdom of judges serve hardly to unravel and lay open its principles; distinctions relied upon in the decisions seem often unnatural, forced, and contradictory, as though the law were training itself into suppleness, in order that courts and juries might deal with individual cases according to discretion. Here we find courts deciding with a bias in favor of great corporations at one time, and of the public at another; and counsel most acute to shift the burden of proof from one litigant to the other. And unless we determine to take no precedent for more than it is worth, to keep fast hold of fundamental bailment principles, and bear constantly in mind that this transportation of movable property to and fro, which involves immense mercantile and commer-

cial interests, such as the ancient world never dreamed of, is but a bailment, whose essence consists in the delivery of a chattel for the accomplishment of a certain purpose, to be succeeded by delivering it back or over when that purpose is accomplished, and that the present idiosyncrasy simply consists in an extraordinary degree of responsibility to which public policy chooses to subject the class of bailees known as Common Carriers, we shall lose our most needful clue.

This branch of bailment law owes most of its inspiration to the creative genius of modern times; so that, unlike the fabled genie which rose cloudlike from the vase of its mysterious confinement, when a fearless hand broke the seal of Solomon, this once-stifled giant of the codes, likewise made free to overspread sea and shore, goes on enlarging in bulk and stature, destined, perhaps, to lose all shapeliness of feature in so immense a mass, yet certain never to re-enter its ancient prison. But in common carriage appears what we may call the full flower of the bailment principle which we have already repeatedly set forth in these pages.

§ 331. **Private and Public Carriers of Personal Property; Common Carrier defined.**—By Carrier we are to understand one who undertakes to transport personal property from one place to another. Our common law deals with two general classes of carriers: (1) Private Carriers; (2) Public or Common Carriers. Private Carriers — a class which (if it be a class at all) comprehends, as will hereafter appear, only isolated cases of transportation, performed by those whose usual vocation is different,¹ save where a recognized Public Carrier undertakes specially to act without reward — rank as simple bailees, incurring the usual responsibilities, and entitled to the usual rights and immunities, either of bailees with

¹ Rare instances, besides, such as the business of towing, will be noted under c. 2, *post*, where the pursuit is not reckoned as a public vocation, nor that of “common carrier,” as it consists rather in a drawing or pulling than a carrying or transporting business.

recompense, or of bailees without recompense, according to the circumstances actually present. But a Public or Common Carrier is one whose regular calling it is to carry chattels for all who may choose to employ and remunerate him.¹ "Carrier," as a technical term of our law, is often employed in this latter sense alone.

§ 332. **Carriers by Land or Water.**—Carriers, private or common, may be (1) carriers by land, or (2) carriers by water; but the transportation business of modern times tends so constantly to forming continuous lines, bridging broad rivers, running cars upon ferry-boats, and, in fine, bringing land and water transit under the same control and management, that the line of demarcation between the two classes, once so boldly traced, has perceptibly faded. Watercraft has its peculiar codes and regulations, whose full exposition belongs not to works on bailment, but to special treatises on shipping and commercial law; land carriage, too, since the successful application of steam to locomotion, whose experimental beginnings in England and America many still living can remember, gives scope for ample text-books on railway law; but the law of bailment, treating of land and water carriers under a common head, with reference to the main performance of their functions, brings into view the leading principles of jurisprudence which affect both classes. These principles it is our purpose to investigate in this and the succeeding chapters.

¹ In the foregoing definitions we follow the established precedents. See *Bony. Dict.* "Carrier," "Common Carrier;" *Story Bailm.* § 495; 2 *Kent Com.* 598. But were the question an open one, it might be argued that the word "carrier" should include the undertaking to transport persons, instead of being confined, as above, to the transportation of chattels; and hence, that one might speak of private carriers of goods (or rather of personal property) and private carriers of persons; and so, correspondingly, of public or common carriers. But the words "carrier" and "common carrier" came to be exclusively applied to chattel transportation, before rules affecting the transportation of passengers attracted judicial attention.

§ 333. **English Theory of Exceptional Responsibility; its Roman Origin.**—The English doctrine, that common carriers of goods and chattels are to be regarded as clothed with singularly vast and exceptional responsibilities, is drawn, in all probability, with its reasons, from Roman sources, and from that prætorian edict to which reference has been made under the head of Innkeepers.¹ “*Nautæ, caupones, stabularii*,” so runs the Digest, “*quod cujusque saluum fore receperint, nisi restituant, in eos judicium dabo*.”² Here, the reader perceives, there is no class of persons expressly designated, in addition to innkeepers and stablekeepers,³ except what we translate “shipmasters;” whence, perhaps, a just inference that land carriage was of too little consequence in imperial times to attract the attention of the magistrates. For certainly, according to modern civilians, as well as writers of common law, not only carriers by water, but carriers by land, have been bound to a corresponding special responsibility from very early times. Domat, one of the most trustworthy writers upon European jurisprudence, has observed, putting Innkeepers and Carriers in the same category, that those who undertake the carriage of goods by land or water are answerable for the baggage and goods which they take charge of, and the custody, carriage, and transportation of the same, and to use all the application and take all the care of them that is possible; and if anything perishes, or is damaged through their fault, or the fault of the persons whom they employ, they ought to answer for it.⁴ This rule of the civil law, while discharging the common carrier from

¹ *Supra*, §§ 274 n., 287.

² Dig. 4, 9, 1; Colquhoun Rom. Civ. Law, § 1969. By *nautæ* we are to understand, not strictly sailors, but *exercitores navis*, so that the word may be rendered by “such carriers by water as are shipowners.” Further, the word *navis* includes all sorts of watercraft, whether for the sea or inland transportation. Colquhoun, *ib.* § 1970; Pand. 14, 1, 1, 6.

³ As to the precise meaning of *stabularii*, see *supra*, § 287.

⁴ 1 Dom. Civ. Law. pt. I. b. 1, tit. 4, § 8, 5; *ib.* b. 1, tit. 16, § 2.

what might happen by such accidents as the greatest care could not have prevented, appears plainly to grant immunity in certain cases of fire or forcible robbery, such as the common law would not so readily excuse; yet it leaves him under great constraint.¹ In a word, both civil and common systems claim to hold common carriers to an accountability unusually strict; but as to the limits of that accountability, they are not in accord. The Anglo-Saxon has apparently laid hold of the Roman idea, but worked it out according to the genius of Anglo-Saxon institutions.²

§ 334. **Carriage and Innkeeping Responsibility to be distinguished; also Roman and English Theories.**—Hence the importance, at the outset, not only of keeping our excepted cases of innkeeper and common carrier quite apart, but likewise of preventing the common and the civil schemes of carrier law from intermingling. For the English sages made

¹ See Story Bailm. §§ 458, 488; Louisiana Code of 1825. 2722-2725; Code Civil of France, art. 1782, 1784, 1929, 1954; 2 Kent Com. 598; 1 Bell Com. 470.

² We should add, however, that an English authority of the day, as eminent as Cockburn, C. J., repudiates the notion (which, to those who acknowledge the foreign source of such early works of English law as that of Bracton, seems reasonable enough) that the English law of carriers was derived from Roman law. His reasons are: (1) That our law was first applied to land carriers, upon whom the Roman law inflicted no extraordinary liability; (2) That the Roman law made no distinction as to "act of God," etc., but afforded immunity from *casus fortuitus* as well as *vis major*. *Nugent v. Smith*, 1 C. P. D. 428. But it may be said, in reply, that law borrows foreign ideas and adapts them, with change, to local and existing wants of society; a remark which holds strikingly true of legislative enactments. And again, if the Roman law could not, by construction, extend its provisions to land carriage, whence is it that the modern civilians derive their own rule for such cases? In other words, if, when occasion first arose, England by inference went from land carriage to water carriage, why might not the Roman law have gone, on a similar exigency, from water carriage to land carriage? It appears, to say the least, a strange coincidence that Innkeepers and Common Carriers should have been subjected to special rules of liability under the Roman and Anglo-Saxon systems, so nearly allied, and yet so that the earlier system could not have influenced the later.

their judicial precedents stepping-stones to a theory of bailment accountability far more rigorous than that of the Romans, certainly as regards common carriers, however it may have been with the innkeeper. True, in the reign of Henry VIII., the opinion prevailed that a common carrier was chargeable, in case of loss by robbery, only when he had travelled by ways dangerous for robbing, or driven by night, or at any inconvenient hour.¹ But under Queen Elizabeth the rising greatness of England's commerce brought this question more into discussion; and it was resolved in the King's Bench, as Sir Edward Coke has recorded, that a carrier "implicitly undertaketh the safe delivery of the goods delivered to him, and therefore he shall answer the value of them if he be robbed of them."² So, too, Lord Holt, in that famous opinion pronounced in Queen Anne's reign, which constitutes the groundwork of our modern law of bailments, observed: "The law charges this person thus intrusted to carry goods, against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresponsible multitude of people should rob him, nevertheless he is chargeable."³ This exposition of the carrier's common-law responsibility has sturdily kept ground in England ever since; and transplanted to America, in the colonial period, the doctrine took equally strong root there. Of all this, however, and the possible modifications of a carrier's responsibility, which legislation and special contract in this later day appear to justify, more in place hereafter.

But here let us add that while the modern development of carriage tends steadily to promote international comity, our Cokes and their compeers, men of clear, gritty, but narrow common sense, and lovers of freedom, were yet legal non-conformists, given to vaunting their ignorance of foreign

¹ Doct. & Stud. Dial. 2 Ch. 33.

² 3 Co. Litt. 89 *a*; 1 Co. Inst. 89 *a*; Moore, 462; Jones Bailm. 103.

³ *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

jurisprudence as a proof of complacent superiority. The institutions they lived under were as yet those of a people who might travel to Europe, but not to confess they could learn anything of foreigners.

§ 335. **Foundation of Exceptional Responsibility is Public Policy.**—In the present instance, as not unfrequently happens, the rule got the start of its reasoning; for, according to Sir Edward Coke and the King's Bench judges, who, without being aware of it, had got a smack of the civil law through some native purveyor, the carrier's obligation was founded in his hire.¹ But it was gradually perceived that the rational ground for holding the carrier so severely must be far broader than this; and, as Lord Holt pointed out afterwards, the great cause of the law charging the carrier was attributable to the public employment he exercises. "This is a politic establishment," he says, "contrived by the policy of the law, for the safety of all persons, the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them, by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point."² This very clear statement is so conclusive of the matter that later judges have constantly announced the same reason, with only verbal variation; and it accords with Ulpian's comment upon the Roman edict, centuries earlier.³ Public policy, then, not private contract, is the foundation of the common carrier's exceptional responsibility.

¹ 3 Co. Litt. 89 a; 1 Co. Inst. 89 a; Moore, 462.

² Lord Holt, in *Coggs v. Bernard*, 2 Ld. Raym. 909, 918. And see 12 Mod. 487.

³ *Maxima utilitas est hujus edicti; quia necesse est plerumque eorum fidem sequi, et res custodie eorum committere.* Dig. Lib. 4, 9, 1. And see Story Bailm. § 458.

§ 336. **Influence of Compensation in this Connection.** — It is observable, however, that the carrier's hire, though not the only, nor even the chief, reason for charging him thus strictly, is yet of influence in the case; that public policy operates only upon the professional carrier working for his compensation. The carrier, to be charged as a public bailee, must be exercising the public vocation on a business footing. For where one carries personal property for another without reward, he is reckoned chargeable, like any other bailee for a bailor's sole benefit, with slight diligence only;¹ a rule which operates not only where one casually conveys something as a favoring friend, but also upon public professional carriers, whenever they take the goods of a particular party free, and for his exclusive benefit.² But a departure from one's usual course of conduct in this particular is not readily assumed; nor will a bailment service be necessarily a service without reward for want of an expected recompense in money. In a common carrier's business transactions, mutual silence implies that the customer shall pay what is reasonable; nor is it enough that the carrier made a mental resolve of benevolence, or used ambiguous words, as that "he would charge little or nothing," for the law to relieve the bailor from yielding recompense if the bailment be well accomplished, or the bailee from accounting as an insurer should it turn out ill.³

§ 337. **Private and Common Carriers for Hire distinguished.** — Private carriers for hire cannot, as a class, be said to exist at this day, either in England or the United States; for,

¹ *Supra*, § 25. *Coggs v. Bernard*, 2 Ld. Raym. 909, is a remarkable case in point.

² *Coggs v. Bernard*, *supra*; *Jones Bailm.* 62, 63; *Beauchamp v. Powley*, 1 Moo. & R. 38; *Fay v. Steamer New World*, 1 Cal. 348; *Story Bailm.* § 457 *n.*; *Michigan Central R. v. Carrow*, 73 Ill. 348.

³ *Gray v. Missouri River Packet Co.*, 64 Mo. 47. See, further, next *c.*; *White v. Bascom*, 28 Vt. 268; *Pennewill v. Cullen*, 5 Harr. 238; *Varble v. Bigley*, 14 Bush, 698.

whenever one plies the vocation of a transporter of chattels from one place to another, and so holds himself out to the public, expecting to be paid for his services, our law affixes to the pursuit of his business, when exercised for reward, the responsibilities of a public employment. But the relation of private carrier for hire may exist when one, not holding himself out to do such business regularly, undertakes, for reward, on a special occasion, to transport property for some particular person, or perhaps persons; as where a country farmer or lawyer, intending to journey to a distant city, takes with him, for the accommodation of his neighbor, a barrel of apples to leave at some city store, or a package of coupon-bonds to deposit with some city banker, understanding that he shall be remunerated for his special trouble. A bailment like this differs not in principle from the general bailments, already discussed, of hired service upon a chattel; in other words, the bailee, apart from a special contract to the contrary, becomes bound to exercise ordinary care and diligence in performing the undertaking, and nothing more.¹ Any private carrier for hire might, nevertheless, so bind himself by the express terms of his engagement as to incur all the risks of a public employment, though this would not readily be expected of him.² Furthermore there are pursuits, analogous at least to carrying, which are nevertheless pronounced exempt usually from the rule of Common Carrier; these can hardly be logically classed among Private Carriers, but at all events they involve this same ordinary bailment standard; the vocation being in effect a private, not a public, one in respect of goods and chattels.³

¹ *Supra*, § 103; Story Bailm. § 457; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Robinson v. Dunmore*, 2 Bos. & Pull. 417; 2 Kent Com. 597.

² *Fish v. Chapman*, 2 Ga. 349; *Harrison v. Roy*, 39 Miss. 396; 30 Miss. 231.

³ See *e. g.* street railways, sleeping-cars, forwarding merchants, tow-boats, etc, in next c.

Not only does a common carrier find himself compelled to encounter extraordinary risks at our law, but he is further bound, according to his facilities, to receive and carry all goods and chattels which are offered him for transportation in the line of his vocation, provided his reasonable compensation be likewise tendered him. This is another consequence resulting from the public employment which such carriers are declared to exercise, and serves like exceptional responsibility to distinguish those of this class from private carriers,¹ since private carriers, and all who exercise a private vocation, are free to select those with whom they shall deal, unless stipulating to the contrary.² A similar obligation to receive all who will pay in advance rests, we have seen, upon those who exercise the public vocation of innkeeper.³

§ 338. **Common Carriers by Land or Water follow the same Rule of Responsibility.** — Though the earliest English carrier decisions bore reference to carriers by land, it was held, as early as the reign of James I., that no substantial distinction, in point of responsibility, could be drawn between these and carriers by water; but that both classes, irrespective of the element on which they exercised their vocation, ought to be held strictly accountable as common carriers of the goods and chattels committed to their custody.⁴ The doctrine has

¹ Story Bailm. § 508; Bac. Abr. Carriers, B.; *Riley v. Horne*, 5 Bing. 217; *Hollister v. Nowlen*, 19 Wend. 234.

Wood, J., has (illogically as it seems to us) embodied this incident or consequence of the relation in a definition of common carrier. A common carrier, he says, is "one (1) who offers to carry goods for any person between certain termini or on a certain route, and (2) who is bound to carry for all who tender him goods and the price of carriage." *The Neaffie*, 1 Abb. 465.

² *Varble v. Bigley*, 14 Bush, 698.

³ *Supra*, §§ 305-308, where the rule is stated with its qualifications. For qualifications in the case of the common carrier, see c. 3, *post*.

⁴ *Rich v. Kneeland*, Cro. Jac. 330. "The first case of this kind," said Lord Holt, "to be found in our books." 12 Mod. 480. See *Jones Bailm.* 106, 107.

since been repeatedly affirmed by the best English and American authorities;¹ and under Charles II. it was solemnly adjudged that not carriers upon inland waters or coastwise alone were thus included (for the earlier case was that of simple bargemen), but shipmasters or owners of vessels, and all who might be employed to carry goods beyond seas in consideration of freight.² Admitting, however, that one and the same standard of responsibility as common carrier is applicable to those occupied in transporting by land or water, it will yet appear that the peculiar perils incident to navigation, and the peculiar methods of averting them, give rise to details of application in the respective classes which do not quite coincide; modern legislation and policy favoring carriers by water who seek to reduce their legal responsibility more than carriers by land.

§ 339. **The Ancient and Modern Common Carrier compared.** — The earliest picture afforded us of the English common carrier by land is that of a horseman toiling along the highway between two market-towns, laden with money, light parcels, and letters, whose chief peril is that of being set upon by thieves in some lonely place, or having his overloaded horse slip down in the mire.³ Shakespeare's Rochester carriers, after a night's stay at the inn, where they appear to have had the worst of its cheer, are hurrying to pack their horses and be off at four in the morning for London, one with his pannier full of turkeys, and the other with "a gammon of bacon and two razes of ginger, to be delivered as far as Charing Cross."⁴ When the reign of Elizabeth began, inland transportation on its most extensive scale was by

¹ See *Trent Nav. Co. v. Wood*, 3 Esp. 127; 2 Kent Com. 598-630.

² *Morse v. Slue*, 1 Vent. 190. And see *Boucher v. Lawson*, Cas. temp. Hardw. 194; *Goff v. Clinkard*, cited in 1 Wils. 282, confirming this decision; *King v. Shepherd*, 3 Story, 319; *Elliott v. Rossell*, 10 Johns. 1.

³ See Doct. & Stud. Dial. 2, c. 38; *Encycl. Britt.* "Carrier."

⁴ First Part of Henry IV., Act II., Scene I.

strings of pack-horses;¹ then came the rude wagon without springs, which, improved, gradually became a fairly convenient vehicle, both for goods and the humbler sort of passengers. The lumbering York wagon, drawn by Flemish cattle, which was used in the early part of the eighteenth century, is preserved to us by Hogarth's pencil; with its bow-shaped top, protected by canvas, under which one could repose by night as in an army tent, its solid body, and heavy wheels. As it thumped slowly into the London inn-yard, the guests stood on the door-steps, while the carrier, first setting his passengers safely on their feet and unharnessing his beasts, proceeded to unload trunks, hampers, packages of every size and description, piles of crockery, barrels, and bales.² Under the Statute of 12 Charles II., the liberty of forwarding letters by private post was taken away from subjects of the realm;³ and then the land carrier had to confine his business to the heavier teaming, of which, doubtless, there was enough, considering his limited means of conveyance.⁴

And this was the land carriage of Coke and Lord Holt,—a legal theme which inspired neither of these nor the later Blackstone.⁵ Yet, long before this, water transportation had attained high renown. Already had the Mediterranean powers, the Dutch Republic, Great Britain, in turn, come to ascribe the most copious source of material prosperity to grasping the carrying trade of the ocean; and to the wars which have been fostered for the sake of gaining and keeping such a prize, the United States, in later times, have been no strangers.

¹ Encycl. Britt. *supra*; 44 Atlantic Monthly, p. 49 (July, 1879).

² See Hogarth's "Harlot's Progress," Plate I.

³ 12 Mod. 482; *Lane v. Cotton*, 1 Ld. Raym. 646; *supra*, § 268.

⁴ *Ib.*

⁵ Land carriers are but lightly touched upon in 3 Co. Litt. 89 *a*; 1 Co. Inst. 89 *a*; and that in language showing a misapprehension. *Supra*, § 320. Blackstone, too, treats the pursuit slightly, as though, in his day, something inferior. 2 Bl. Com. 453; 3 *ib.* 165.

§ 340. **The same Subject.** — But, meantime, our land carrier has made progress. During the eighteenth century, and the earlier part of the nineteenth, the stage-coach, which had been known in and about London since 1650, greatly extended its facilities; post-roads were multiplied; and the local and inland business, for conveying both passengers and goods, became, in England and America, organized on a much more liberal scale than before, so as to meet the increasing demand for extensive transit. But, until horse-power began to be superseded for long distances, half a century ago, by steam, the capacity of the carrier car was trifling as compared with vessels; and the promoters of inland traffic devoted their enterprise to canals and a connected water highway. If expanded vapor has wrought wonders in navigation since this century opened, the revolution it has accomplished during a much shorter period, in method and the bulk of land carriage, has been overwhelming. Capacious cars are yoked together in a long line, and whole cargoes of grain and produce are now rapidly drawn to the seaboard from some far inland point. Hence, if the past should serve as a criterion of the future, those now living may yet see some new and more convenient means of transit introduced, while it is certain that the interchange of the world's commodities will grow, rather than diminish, as civilization advances its steps.¹

¹ A new and remarkable social phenomenon of this day, as concerns inland carriage in America, is the spectacle of municipal and local governments uniting with individual capitalists and stock companies in the common pursuit of monopolizing for themselves the privilege with its gains of trundling freight and passengers back and forth. It has grown common to speak of railway kings; and truly he wields despotic functions in the community at whose will cities and towns bud forth or fade out, and States advance or intermit their lustre. Inland carrying trade has grown already into the great compeer of that on the ocean highway; a potent factor of necessity in the opulence of a State or nation; and yet, from the internal confines of the pursuit, tending less to the general enrichment of a people than external traffic, but rather to local wealth; thus provoking

§ 341. **Carriers of Personal Property to be considered; Carriers of Passengers distinguished.** — Treating of carriers as a branch of bailment law, we shall proceed to discuss the subject at length in several succeeding chapters, with sole reference to the transportation of personal property; in which sense alone our courts are wont to specify the vocation of “common carriers,” or to apply the personal word “carrier.” But “carriers of passengers” is a topic which will deserve our final attention in this volume, not only for the reason that this business is now so closely interwoven with chattel transit, and so extensively pursued under the same management, but because of the implied bailment relation which is incidentally created between the carrier himself and his passenger’s baggage. To speak candidly, there can be, of course, no bailment of human beings, as our present law runs; and, to the persons of passengers, as will duly appear, the courts have steadily refused to extend the severe doctrine of common carriage or insurance responsibility. Yet, for one’s baggage, the passenger carrier is in effect answerable, on the footing of common carrier; and, as to passengers themselves, should he occasion loss of life or limb to any human being under his charge, he would be held responsible, like one whose employment is in some sense public, and justly intended to be exercised for the public welfare.¹

municipal rivalries, and festering, unless skilfully treated, into internal strife, civil dissensions, and public corruption. If, as history teaches us, rival contention for the ocean’s commerce fructifies in foreign wars, that for the prizes of inland carriage may germinate into rebellion and anarchy.

¹ See *Passenger Carriers*, *post*, Part. VII; *Story Bailm.* § 590; *Steamboat New World v. King*, 16 How. (U. S.) 469; *Collett v. London & North Western R.*, 16 Q. B. 984.

CHAPTER II.

NATURE OF THE COMMON CARRIER RELATION.

§ 342. **Essentials of the Common Carrier Relation stated.** — When controversy arises over the rights or responsibilities of a given bailment relation which had in view the transportation of certain personal property from one place to another, this is the preliminary inquiry: Did the bailee undertake to transport the thing as a common carrier, or in some less perilous bailment capacity? And if it were by inference as a common carrier, then his transportation undertaking must have been (1) for reward, and (2) in pursuance of some carriage vocation which he exercises. For, though any hired bailee might expressly contract to be unduly bounden, the common carrier is one who, by virtue of his calling, undertakes, on recompense, to transport personal property from one place to another for all such as may choose to employ him.¹

§ 343. **Transportation must be for Reward; Presumption of Recompense, etc.** — 1. The transportation in question must have been for reward. For if it were plainly a gratuitous undertaking, though performed by one who usually charges for such service, this is nothing more than a gratuitous bailment for the bailee's sole benefit.² Hence we may lay it down

¹ *Supra*, § 331; *Dwight v. Brewster*, 1 Pick. 50, per Parker, C. J.; *Sheldon v. Robinson*, 7 N. H. 157; *Story Bailm.* § 495. Wood, J., in *The Neaffie*, 1 Abb. 465, appears to think such a definition too broad. He qualifies it by making the undertaking or offer one to carry between certain termini, or on a certain route. Such is usually the nature of such a business, but not necessarily, as will presently appear.

² *Beauchamp v. Powley*, 1 Moo. & R. 38; *Fay v. Steamer New World*, 1 Cal. 348; *Blanchard v. Isaacs*, 3 Barb. 388; *Michigan Central R. v. Carrow*, 73 Ill. 318; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Flint R. v. Weir*, 37 Mich. 111; *supra*, § 336.

as a rule that no one is to be designated common carrier in a particular case unless he performed as a carrier for hire. But liability as a common carrier does not necessitate the prepayment of carriage charges, provided only the carrier has a right to demand a recompense;¹ nor is one any the less a common carrier because the stipulated reward is other than money, or because the rate was not fixed in advance, or because the undertaking may have turned out disadvantageous to him; for it suffices that the undertaking itself was expressly, or by implication, an undertaking for reward.² Even an extra service which is performed by the carrier as an inducement to customers who pay their regular transit fees, is not easily separable from the main undertaking as itself gratuitous; as for instance where one's rule is to return free the empty bags of consignees who employ him as the carrier of their grain, and the loss occurs while he is so returning them.³

The general presumption is that one usually transporting for hire in the course of his business has undertaken to transport for hire in a particular instance; and the law here infers the mutual understanding of a reasonable compensation for the service on a *quantum meruit* where none was expressly agreed upon, without requiring proof of an express promise.⁴

§ 344. **The same Subject.**— On the same general principle, a carrier's employé, who, out of the plain course of the carriage business itself, takes letters or parcels gratuitously for persons, like the conductor of a passenger railway train, or clerk of a steamboat, does not bind the employer as common carrier for their safe delivery; but, if at all, only as a gratuitous bailee bound to the exercise of slight diligence;

¹ Indianapolis R. v. Herndon, 81 Ill. 143.

² *Supra*, § 29; Knox v. Rives, 14 Ala. 249; Kirtland v. Montgomery, 1 Swan, 452; Hall v. Cheney, 36 N. H. 26.

³ Pierce v. Milwaukee R., 23 Wis. 387.

⁴ Gray v. Missouri River Packet Co., 64 Mo. 47; Gott v. Dinsmore, 111 Mass. 45

nor would the vague object of rendering the line a popular one by so doing change the gratuitous nature of the bailment.¹

§ 345. **Transportation must be in Pursuance of Vocation.** —

2. The transportation in question must have been in pursuance of some carriage vocation which the carrier exercises. And here our main object is, to distinguish one sort of hired bailee from another, with a view to determining whether the bailment responsibility in a particular instance shall be pronounced ordinary or extraordinary. In an early case, it was said that any person who undertakes to carry, for hire, the goods of all persons indifferently, is, in respect of the liability thereby incurred, a common carrier;² and this statement is frequently found embodied in the opinions of our modern courts.³ But Alderson, B., used what, to this age, appears clearer language, when he said that every one who undertakes to carry for any one who asks him is a common carrier. "The criterion," he continues, "is whether he carries for particular persons only or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier; but if he does not do it for every one, but carries for you or me only, that is a matter of special contract."⁴ Once more, a pertinent statement of Judge Story is found constantly cited in the books: namely, that to bring a person within the description of a common carrier, he must exercise the business "as a public employment; he must undertake to carry goods for persons generally; and he must hold himself out as ready to engage in the transportation of

¹ *Bac. Abr. Carriers, A.*; *Coggs v. Bernard*, 2 *Ld. Raym.* 909; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 *Story*, 16; *Allen v. Sewall*, 2 *Wend.* 327; *Hall v. Cheney*, 36 *N. H.* 26.

² *Gisbourn v. Hurst*, 1 *Salk.* 249.

³ *Mershon v. Hobensack*, 22 *N. J. L.* 372; *Verner v. Sweitzer*, 32 *Penn. St.* 208; *Cincinnati Mail Line Co. v. Boal*, 15 *Ind.* 345; *Elkins v. Boston & Maine R.*, 3 *Fost.* 275; *Haynie v. Waring*, 29 *Ala.* 263.

⁴ *Ingate v. Christie*, 3 *Car. & K.* 61.

goods for hire as a business, not as a casual occupation *pro hac vice*.”¹

This holding out, then, to the public, that one is ready to carry things generally, in pursuance of some regular calling, appears the prime element that distinguishes the common carrier from a mere private carrier for hire. And circumstances must determine such an issue, as in the case of an innkeeper.² Hence proof that one has, in the course of his vocation, for a long period carried for such as chose to employ him will readily charge him as a common carrier.³ And the carrier's sign, his business cards, advertisements, and circulars, may, any or all, be material in such an issue.⁴ Dubious expressions thus put forward should certainly not be distorted, by forced legal construction, into an offer of general carriage;⁵ and the restrictive and explanatory terms under which one holds himself out as doing a transporting business might, in a clear case, negative any inference in favor of his being treated as a common carrier for general customers.⁶ But where an individual's acts, or conduct, his methods of business, and the propositions he holds out for conducting it, lead naturally to the inference that he exercises, or offers to exercise, the vocation of common carrier, they who intrust goods and chattels to him upon the confidence that he is a common carrier can hold him responsible accordingly.⁷

§ 346. **The same Subject.** — Difficulties are presented in case the transporting party has carried but once or twice in

¹ Story Bailm. § 495; Citizens' Bank v. Nantucket Steamboat Co., 2 Story, 32; Satterlee v. Groat, 1 Wend. 272; Fish v. Chapman, 2 Ga. 349; Anonymous v. Jackson, 1 Hayw. 14; Sanms v. Stewart, 20 Ohio, 71; Elkins v. Boston & Maine R., 3 Fost. 273, 280. But see our definition, *supra*, § 342.

² *Supra*, § 276.

³ Haslam v. Adams Express Co., 6 Bosw. 235.

⁴ Ingate v. Christie, 3 Car. & K. 61.

⁵ Oxlade v. North-Eastern R., 9 W. R. 272.

⁶ Scaife v. Farrant, L. R. 10 Ex. 358.

⁷ See Browne Carriers, 46, 47.

this manner, or for one or two particular patrons; though such difficulties are rather of proof than of principle. Thus, in a case where the owner of a sloop was specially employed to make a certain trip for a load of grain, on the promise of a certain sum of money for doing so, he was held not sufficiently chargeable as a common, rather than a private, carrier.¹ And so was it decided, where the owners of a boat, used for their own purposes, merely permitted some other parties to use it with them on the payment of certain rates.² But had evidence been produced, showing further that the party in either instance had offered his vessel to the public for such trips, the decision would probably have been different. For a common carrier is rightfully made responsible on his general undertaking to carry things for reward, even though the trip be his first;³ nay, as a recent case has held, though but one trip at all were contemplated;⁴ since it is the public carriage intention which is material to such an issue, rather than the longer or shorter fulfilment of that intention. On the other hand, a party once a common carrier, who has clearly discontinued such business, is but an ordinary bailee towards a stranger for whom he casually transports property at a much later date;⁵ though, like a retiring partner, one who has been lately engaged in a certain business, from which he withdraws, must take heed how he permits himself to be held out to old customers who seek him.

§ 347. **The same Subject; Casual Occupation, etc.** — Again, notwithstanding what text-writers may have said of a business, as distinguished from one's casual occupation *pro hac vice*, there is no denial that one may render himself liable as a common carrier, even though he pursues this carriage calling

¹ Allen v. Sackrider, 37 N. Y. 141.

² Flautt v. Lashley, 36 La. Ann. 106.

³ Fuller v. Bradley, 25 Penn. St. 120. But see Elkins v. Boston & Maine R., 3 Fost. 275.

⁴ Steele v. McTyer, 31 Ala. 667.

⁵ Satterlee v. Groat, 1 Wend. 272; Steele v. McTyer, *supra*.

at the same time with other business.¹ Thus, if one whose principal pursuit is farming solicits goods to carry to the market-town in his wagon on certain convenient occasions, he makes himself a common carrier for those who then employ him.² Such, at least, is the well-considered result of several American decisions, which appear to justify the general assertion, that whether the business of common carrier be principal or subordinate, leading or incidental, usual or only at periods, the law subjects it, while it is being pursued, to all the consequences of exercising a public profession.³ But where one of a different vocation assumes towards those who may choose to employ him the business of carrier only at particular seasons of the year, it does not follow that at other seasons, and under exceptional circumstances, his casual transportation of goods would render him liable therefor, as a common carrier.⁴

On the other hand, one may be a common carrier and at the same time conduct a private pursuit; nor does it follow that because he exercises a public vocation in one sense he exercises it in another and all senses.⁵

§ 348. **The same Subject; Carriage between Fixed Points, from Town to Town, etc.** — A person who is engaged in carrying generally, for others, to and from any point, is a common carrier, notwithstanding his trips be not regular between the same points, or places.⁶ One may even be a common carrier, who has no fixed termini, but leaves the course of transporta-

¹ See *Dwight v. Brewster*, 1 Pick. 50, per Parker, C. J.

² *Gordon v. Hutchinson*, 1 W. & S. 285; *Angell Carriers*, §§ 70, 71; *Harrison v. Roy*, 39 Miss. 396.

³ *Ib.*; *Chevallier v. Straham*, 2 Tex. 115; *Moss v. Bettis*, 4 Heisk. 661. But see *Fish v. Chapman*, 2 Ga. 349.

⁴ *Haynie v. Baylor*, 18 Tex. 498.

⁵ Thus, a common carrier, who contracts with government to carry the mails, exercises no public vocation as postmaster or common carrier towards the sender of a letter by the mail. *Central R. v. Lampley*, 76 Ala. 357.

⁶ *Pennewill v. Cullen*, 5 Harr. 238.

tion in each case to depend upon his customers' wishes.¹ And a carrier whose line of business is a certain route between certain points, but who undertakes to carry or to have the goods transported to a point beyond or out of his route, has been held, in that instance, a common carrier for the whole transit; a doctrine of the utmost consequence in its application to connecting railways.² So, should one who habitually uses his wagon or barge to convey his private produce to market, and then loads up with supplies to bring home for such of his neighbors as will pay him for the service, be adjudged a common carrier, in respect of the return trips.³ It is usual, however, for a common carrier to hold himself out as carrying between certain fixed termini, or on a certain route, or as his customers may desire within some circumscribed limits.

It appears to have been a common impression in England, once, that, to constitute any party a common carrier, the transportation must needs be from one town within the realm to another.⁴ But a public relation of such magnitude cannot, at this day, be regarded as circumscribed within such positive confines. For, first, it must be admitted that one who offers himself, generally, to transport personal property from one part of the same town to another is not less a common carrier than one who plies his vocation between two municipalities.⁵ And, in the second place, it is now well settled, that one may be a common carrier, though he undertake to transport or to

¹ *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; s. c., on appeal, L. R. 9 Ex. 338.

² *Muschamp v. Lancaster R.*, 8 M. & W. 421; *Tuckerman v. Stephens, &c. Trans. Co.*, 32 N. J. L. 320; *Wilcox v. Parmelee*, 3 Sandf. 610. Cf. *Pitlock v. Wells*, 109 Mass. 452. See *post*, c. 9.

³ *Harrison v. Roy*, 39 Miss. 396.

⁴ See *Story Bailm.* § 496 *n.*; *Brind v. Dale*, 8 C. & P. 207.

⁵ See *Ingate v. Christie*, 3 C. & K. 61; *Richards v. Westcott*, 2 Bosw. 589; *Robertson v. Kennedy*, 2 Dana, 430; *Story Bailm.* § 496; 2 Kent Com. 593, 599; *Angell Carriers*, § 74.

send goods from a place within the realm to one without it; or, with reference to this country, from a place in one State to a place in another State, or, indeed, to some point quite outside of the United States;¹ for, were it otherwise, not only would foreign trade by the ocean be too little subjected to the wholesome restraints of public policy, but our modern railways would be worse for the want of similar discipline. We speak here of contract rights, and duties assumed within our own jurisdiction, without reference to the possible conflict of laws which might affect the enforcement of legal remedies in some foreign tribunal.

§ 349. **Either a Professed Vocation or a Special Undertaking should appear.**—In general, to charge a person as a common carrier who transports personal property for hire, the transportation in question should come within the scope of the professed vocation of common carrier; unless, indeed, some special undertaking to carry in such a capacity should appear.² One's special undertaking may help out his general undertaking and establish the public vocation in question. But no written memorandum is needful to prove such a special undertaking;³ for the proof may be oral and evinced by one's conduct and circumstances.

The special agreement to transport gratuitously may place one who is usually a public carrier on the footing of private carrier and gratuitous bailee in a particular instance; and so, too, may a special undertaking (such as we seldom find) place a private carrier or ordinary bailee on the footing of public carrier, with corresponding risks and responsibility.⁴ But

¹ This holds true of water conveyance. *Morse v. Slue*, 1 Mod. 85; *Nugent v. Smith*, 1 C. P. D. 19, 423; *Elliott v. Russell*, 10 Johns. 1. And of transportation by railway. *Crouch v. London, &c. R.*, 14 C. B. 255; *Burtis v. Buffalo R.*, 24 N. Y. 269.

² *Tunnel v. Pettijohn*, 2 Harr. 48; 30 Miss. 231; *Fish v. Chapman*, 2 Ga. 319; *Harrison v. Roy*, 39 Miss. 396; *Varble v. Bigley*, 14 Bush, 693.

³ *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

⁴ See *supra*, § 337.

aside from such special undertaking, the main elements which determine the issue of common carrier are the two which we have described at length.

§ 350. **What Pursuits are classed with Common Carriers; Carriers by Land.** — We now proceed to inquire what pursuits by land or by water are most commonly classed with common carriers. 1. As to occupations by land. Wagoners and teamsters, whose business it is to carry on hire goods and chattels from one locality to another, stand earliest among the recognized common carriers of our law,¹ after the loaded horseman;² and to these may be added common porters, riders, draymen, truckmen, and cartmen; it mattering not whether such employment be carried from town to town, or from one part of a town to another.³ A city express engaged in transporting parcels or the baggage of travellers within the city limits,⁴ and local expresses, so called, whose business is carried on from one town to another in special conveyances, after the fashion of the ancient wagoner, fall alike under the denomination of common carriers.

§ 351. **The same Subject; Express and Forwarder distinguished.** — But our modern express, which forwards for hire over transportation routes by means of conveyances otherwise controlled, presents a somewhat novel aspect. The American pioneer in that business is said to have journeyed in person, by steamboat and rail car, between New York and Boston, with all his customers' valuables contained in a hand-satchel; but the pursuit thus humbly originating forty years ago now commands immense capital, and lays the civilized world under

¹ *Gisbourn v. Hurst*, 1 Salk. 249; *Gordon v. Hutchinson*, 1 W. & S. 285; *Story Bailm.* § 496.

² *Supra*, § 339.

³ *Story Bailm.* § 496; *Angell Carriers*, §§ 74, 76; 2 Kent Com. 598; *Robertson v. Kennedy*, 2 Dana, 431; *supra*, § 348.

⁴ *Verner v. Sweitzer*, 32 Penn. St. 208; *Richards v. Westcott*, 2 Bosw. 589; *Parnellee v. Lowitz*, 74 Ill. 116. Cf. *Scaife v. Farrant*, L. R. 10 Ex. 358.

contribution.¹ True is it that such a pursuit somewhat resembles the earlier one of "forwarding merchant," which it has largely superseded; and forwarding merchants were always adjudged not to be liable at our law as common carriers, but only for ordinary diligence.² Hence an early hesitation in the courts about treating the express carrier differently.³ But forwarders, besides participating in no wise in the control of the carriage, were only a sort of commission merchant, employed mainly in warehousing, or for buying and selling the goods they forwarded; and, indeed, one who simply sells to a distant customer becomes almost invariably a forwarder of merchandise to him in the same sense. Any carrier, too, for his own route, may undertake to become the forwarder beyond its terminus.⁴ Forwarders naturally take instructions of a customer as to the line or the mode of transmitting his goods; and deviation from the customer's directions in this respect has rendered a forwarder personally answerable for the loss sustained in consequence, notwithstanding his honesty of purpose, and the refusal of the designated line to take the goods;⁵ though, we should add, it may be the right and duty of forwarders to pay advance charges of the carrier, looking to their own employers for full reimbursement.⁶ The express, on the other hand, makes a through transportation its main concern; it forwards, as a rule, on lines of its own choice, under the continuous supervision of its own agents, and in pursuance of private arrangements with the transporters, of which its

¹ See Am. Cycl. "Express." Harnden, an American, instituted the modern express in 1839.

² Angell Carriers, § 75; Story Bailm. § 502; 2 Kent Com. 591, 592; Platt v. Hibbard, 7 Cow. 497; Maybin v. South Carolina R., 8 Rich. 240; Northern R. v. Fitchburg R., 6 Allen, 254; Stannard v. Prince, 64 N. Y. 300.

³ Hersfield v. Adams, 19 Barb. 577.

⁴ See Northern R. v. Fitchburg R., 6 Allen, 254; *post*, c. 9.

⁵ Johnson v. New York Central R., 33 N. Y. 610; Angell Carriers, § 75; Proctor v. Eastern R., 105 Mass. 512.

⁶ Stannard v. Prince, 64 N. Y. 300.

own customers are not cognizant; it solicits business from the public, and its service is sought mainly because of the peculiar assurance thus afforded, that property which, because of its nature, its value, or the peculiar hazards of the journey, requires personal watchfulness throughout the transit, shall reach its destination in safety. Accordingly, in this country, it has at length become clearly settled that expresses are liable, not as forwarders, but as common carriers;¹ nor can this doctrine yield to their use of such misleading titles as "transportation company," "forwarder," and the like, for designating what, in fact, is an express business, conducted after the company's own judgment.²

The owner of property lost on transit while being expressed may, if he prefer, sue the transporting carrier instead of the express; but a reasonable arrangement, in force between those parties themselves, might qualify such a right on his part;³ and doubtless the express carrier, on making the loss good, as he was bound to do, should gain the owner's rights against the carrier, who, actively transporting the thing, occasioned, in reality, the mischief. Generally speaking, one who employs an express will sue this carrier for a loss rather than the transporting carrier who did the mischief as agent of the express.⁴

§ 352. **The same Subject; Carriers of Passengers, Baggage, and Goods.**—The business of stage-coach or omnibus has

¹ *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Haslam v. Adams Express Co.*, 6 Bosw. 235; *Belger v. Dinsmore*, 51 Barb. 69; *Southern Express Co. v. Newby*, 36 Ga. 635; *Sweet v. Barney*, 23 N. Y. 335; *Southern Express Co. v. McVeigh*, 20 Gratt. 264; *Southern Express Co. v. Hess*, 53 Ala. 19; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Christenson v. Am. Exp. Co.*, 15 Minn. 270.

² *Mercantile Mut. Ins. Co. v. Chase*, 1 E. D. Smith, 115; *American Express Co. v. Pinckney*, 29 Ill. 392; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174.

³ *Langworthy v. New York, &c. R.*, 2 E. D. Smith, 195; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344.

⁴ *Boscowitz v. Adams Express Co.*, 93 Ill. 523.

primary reference to the carriage of passengers, in which sense the strict common-carriage liability can affect only the baggage accompanying the parties who are so conveyed.¹ But where this business is so extended as to hold out the carrier of passengers to the public as a carrier likewise for all who may choose to send on hire parcels, money, valuables, or other chattels, by his conveyance, this will constitute the stage or omnibus proprietor a common carrier for customers of the latter description.²

The same doctrine is true of railways, but with far better presumption in its favor; for our modern railways, unlike the stage-coach lines they so widely displace, have constantly assumed, with their immense inland facilities, to carry over their route both passengers and general freight. Railways, in short, are common carriers both of goods and chattels received as freight, and of the baggage of their passengers; and they are, moreover, passenger carriers.³ Yet railway freight trains and passenger trains are commonly run separately, and on different time-tables; hence the inquiry may often become pertinent, whether the fact of receiving mere freight on rare occasions upon passenger trains, apart from the baggage and effects of persons actually conveyed, will render the railway liable to such bailors as a common carrier. Such an issue

¹ See *Passenger Carriers*, *post*, Part VII.; *Story Bailm.* §§ 496, 499; *Angell Carriers*, § 77.

² *Bac. Abr. Carriers*, A.; *Middleton v. Fowler*, 1 Salk. 282; *Dwight v. Brewster*, 1 Pick. 53; *Beckman v. Shouse*, 5 Rawle, 179; *Robertson v. Kennedy*, 2 Dana, 430; *Story Bailm.* § 500; *Powell v. Mills*, 30 Miss. 231; *Merwin v. Butler*, 17 Conn. 138. That omnibuses follow the doctrine of stage-coaches, in their course of business, as usually pursued, see *Parmelee v. McNulty*, 19 Ill. 556; *Verner v. Sweitzer*, 32 Penn. St. 208; *Dibble v. Brown*, 12 Ga. 217. And see, as to the proprietor of a line of omnibuses and baggage-wagons, *Parmelee v. Lowitz*, 74 Ill. 116.

³ 2 *Redfield Railways*, 235; *Story Bailm.* § 500; *Angell Carriers*, § 78; *Parker v. Great Western R.*, 7 M. & G. 253; *Camden & Amboy R. v. Burke*, 13 Wend. 611; *Thomas v. Boston & Providence R.*, 10 Met. 472; *Hannibal R. v. Swift*, 12 Wall. 262. For a passenger carrier's liability as to baggage, see *post*, Part VII.

must depend upon the particular circumstances of the case; and while isolated exceptions of such hired employment prove no rule, a practice in this respect pursued by one's suitable agents may extend the principal's responsibility beyond the usual limitations.¹ Even a street railway, whose regular occupation is that of transporting passengers, and that without any baggage, may be proven a common carrier of merchandise by the habitual conveyance thereof on hire to accommodate the public.²

Stage-coaches, omnibuses, and street railways are *prima facie* passenger carriers, and not held out as common carriers of goods for the general public, however it may be as to baggage, which is incidental to the passenger service; but with steam railways it is commonly otherwise, for they advertise for freight, and issue rate schedules for transporting merchandise; and they moreover run special trains, provide suitable cars, and maintain buildings expressly for receiving and delivering goods and chattels consigned them for transportation.³

§ 353. **The same Subject; Sleeping-Cars.** — The special business of supplying sleeping-cars to railway trains, for travellers who may choose to pay for the extra accommodations so afforded them, is held no common-carrier pursuit, in the sense of imposing an exceptional bailment responsibility for what the occupant may have about him.⁴ This seems to be, however, because the responsible transporter of baggage and passengers is the railway

¹ See *Murch v. Concord, &c. R.*, 9 Fost. 9; *Elkins v. Boston & Maine R.*, 3 Fost. 275.

² *Levi v. Lynn, &c. Horse R.*, 11 Allen, 300.

³ Cf. *Powell v. Mills*, 30 Miss. 231; *Thomas v. Boston & Prov. R.*, 10 Met. 472. And see *Kimball v. Rutland R.*, 26 Vt. 247.

A railway may be a common carrier of goods, even though its charter does not style it thus; for the business itself sufficiently imports such an occupation. *Chicago R. v. Thompson*, 19 Ill. 578.

⁴ *Pullman Palace Car v. Smith*, 73 Ill. 360; *Blum v. Pullman Palace Car Co.*, 1 Flip. C. C., 500; *Tracy v. Palace Car Co.*, 67 How. (N. Y.) Pr. 154. Cf. 1 *Sheldon* (N. Y. Super.), 457. Nor is an innkeeper's liability imputed. 73 Ill. 360.

company. In some aspects of his business, at all events, a sleeping-car proprietor must conduct himself as one who exercises a public vocation;¹ and at all events he must exercise ordinary care and diligence within the scope of his trust, like any other bailee for hire.²

§ 354. **Common Carriers by Water.** — 2. As to occupations by water. A bargeman, hoyman, lighterman, or boatman, whose carriage of goods by water is near shore, has long been adjudged a common carrier.³ To ferrymen, or ferry companies,⁴ and those plying canal boats,⁵ the same doctrine should apply; the ferries of this day, however, usually taking loaded teams on board with their drivers, whose partial control much affects the issue of responsibility, while canal boats are rather

¹ Thus, he cannot select his patrons at pleasure, but must treat all the public alike. *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

² *Kinsley v. Lake Shore R.*, 125 Mass. 54; *Woodruff Co. v. Diehl*, 84 Ind. 474; *Blum v. Pullman Palace Car Co.*, 1 Flip. C. C. 500. Thus, the sleeping-car company should not only furnish a berth at night, but keep a watch, exclude unauthorized persons from the car, and take reasonable care towards preventing thefts and loss. *Ib.*

That the railroad company cannot evade its own duty as responsible transporter, by placing blame upon the sleeping-car proprietor, see *Pennsylvania Co. v. Roy*, 102 U. S. 451; Part VII., *post*.

³ *Jones Bailm.* 106-108; *Rich v. Kneeland*, Cro. Jac. 330; *Bac. Abr. Carriers, A.*; *Morse v. Slue*, 1 Mod. 85; *Angell Carriers*, § 79; *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; s. c., on appeal, L. R. 9 Ex. 338; *Allen v. Sewall*, 2 Wend. 327; *supra*, § 338; *Moss v. Bettis*, 4 Heisk. 661.

⁴ *Story Bailm.* § 496; *Willoughby v. Horridge*, 12 C. B. 742; *White v. Winnisimmet Co.*, 7 Cush. 156; *Angell Carriers*, § 82; *Smith v. Seward*, 3 Penn. St. 342; *Pomeroy v. Donaldson*, 5 Mo. 36; *Sanders v. Young*, 1 Head, 219; *Wilson v. Hamilton*, 4 Ohio St. 722; *Powell v. Mills*, 37 Miss. 691; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Lewis v. Smith*, 107 Mass. 334; *Harvey v. Rose*, 26 Ark. 3. The ferry occupation must be a public one, and for hire, in order to render one a common carrier. *Self v. Dunn*, 42 Ga. 528; *Ferris v. Union Ferry Co.*, 36 N. Y. 312; *Wyckoff v. Queens County Ferry Co.*, 52 N. Y. 32.

⁵ *Angell Carriers*, § 81; *Arnold v. Halenbrake*, 5 Wend. 33; *De Mott v. Laraway*, 14 Wend. 225; *Spencer v. Daggett*, 3 Vt. 92. *Aliter*, under certain inconsistent circumstances. *Beckwith v. Frisbie*, 32 Vt. 559.

employed in conveying cattle and inanimate freight placed under the carrier's sole charge. One who has a raft or flatboat suitably employed may be a common carrier, even though intending to go down the river but once, and then break up his transport and sell it for lumber;¹ a mode of water-carriage formerly quite in vogue on the Mississippi and its tributaries. Steamboats, which have from their first introduction on the Hudson River, in the early part of this century, transacted a general freight and passenger business, are established, both in England and America, by a long series of decisions, to be common carriers, both for the baggage of passengers, and as to goods which are shipped by general consignors.²

But here, as elsewhere, the employment to be designated as common carriage is that held out for conveying personal property for all who may pay for the particular service. A canal company which simply allows the use of its water-highway to the boats of customers, who pay tolls, is not a common carrier.³ For it is the control of the transporting vehicle, or, at least, participation in the transportation performance itself, which gives to one the status of carrier; and his duty must be not passive, but active, as concerns the goods. Neither is a tow-boat usually taken to be a common carrier,⁴ though in such a case the border line runs very close: since here the legal responsibility imposed is that of exercising ordinary care, diligence, and skill in performing a peculiar service which consists in drawing, pulling, tugging, but not carrying certain vessels, with their cargoes, of which other

¹ *Steele v. McTyer*, 31 Ala. 667. And see *supra*, § 346.

² *Story Bailm.* § 496; 2 *Kent Com.* 599; *Angell Carriers*, § 83; *Siordet v. Hall*, 4 *Bing.* 607; *Allen v. Sewall*, 2 *Wend.* 327; *Jencks v. Coleman*, 2 *Sumn.* 221; *Harrington v. M'Shane*, 2 *Watts*, 443; *Hale v. New Jersey Steam Nav. Co.*, 15 *Conn.* 539; *Bowman v. Hilton*, 11 *Ohio*, 303; *Porterfield v. Humphreys*, 8 *Humph.* 497; *Bennett v. Filyaw*, 1 *Fla.* 403.

³ *Exchange Ins. Co. v. Delaware Canal Co.*, 10 *Bosw.* 180. And see *post*, § 356.

⁴ *Grigsby v. Chappell*, 5 *Rich.* 443.

parties have the active control.¹ Nor is log-driving considered a common-carriage pursuit.²

§ 355. **The same Subject.** — Some have essayed to set up a legal distinction between carriage on inland waters and ocean carriage.³ But this, upon ample consideration, the courts of Great Britain long ago held to be untenable. And the English doctrine is that they who carry, by a ship or vessel, whether propelled by steam or wind, goods, chattels, and merchandise, the same being conveyed as freight under their general undertaking to perform such carriage for the public, shall be held answerable all the same, whether the transportation be on inland waters, coastwise, or by the high seas.⁴

¹ *Transportation Line v. Hope*, 95 U. S. 297; *Angell Carriers*, § 86; *Caton v. Rumney*, 13 Wend. 387; *Wells v. Steam Nav. Co.*, 2 Comst. 204, per Bronson, J.; *Hays v. Paul*, 51 Penn. St. 134; *The New Philadelphia*, 1 Black, 62; *Ashmore v. Penn. Steam Towing Co.*, 4 Dutch. 180; *White v. The Mary Ann*, 6 Cal. 462; *The Neaffie*, 1 Abb. 465; *Varble v. Bigley*, 14 Bush, 698; *Hays v. Millar*, 77 Penn. St. 238. But see *Sproul v. Hemmingway*, 14 Pick. 1; *Clapp v. Stanton*, 20 La. Ann. 495.

In *Bussey v. Miss. Valley Trans. Co.*, 24 La. Ann. 165, a distinction is founded upon the method of employing the tow-boat. A tow-boat, observes the court, may well be said to be no common carrier, when it is employed as a mere means of locomotion under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini. But the tow-boat must be held responsible as a common carrier, where, as in the present case, she plies regularly between fixed termini, towing, for hire and for all persons, barges laden with goods, and taking into her full possession and control, and out of the control of the bailor, the property thus transported.

² *Mann v. White River Log Co.*, 46 Mich. 38. This business consists in running, rafting, and booming logs down stream. And see, as to the business of a mud-scow, under peculiar circumstances, *Bell v. Pidgeon*, 5 Fed. R. 634; and as to hauling hired cars, *St. Paul R. v. Minneapolis R.*, 26 Minn. 243.

³ *Morse v. Shue*, 1 Vent. 190; *Jones Bailm.* 109; *Trent Nav. Co. v. Wood*, 3 Esp. 127; *Boucher v. Lawson*, Cas. temp. Hardw. 183.

⁴ *Ib.* In *Nugent v. Smith*, 1 C. P. D. 19, Brett, J., sets forth the view that not only such ship-owners as have made themselves in all senses common carriers are liable to that extent; but all ship-owners who carry

This appears now to be the well-settled rule in America, likewise;¹ though one or two early State decisions appear to have inclined to a different conclusion.² And yet, at the present day, the liability of ship-owners in respect of the carriage of property is, both in England and the United States, largely controlled by legislative enactments, founded upon an appreciation of the peculiar hazards incurred, which we shall take occasion to examine in a later chapter.³

§ 356. **Relation attaches to the Responsible Bailee as Individual, Partnership, or Company.** — In all of the pursuits we have just enumerated, the rights and responsibilities of the common-carriage relation attach to parties having possession, control, and authority in the bailment performance; that is, to the real bailee. It is not the mere wagoner or boatman, the railway conductor, engineer, or navigator, who incurs the risks of a common carrier, but rather the permanent or temporary proprietor of the vehicle, with its contents, the transporting party in charge of the goods, the principal in the business for the time being; except that any one accepting goods for transit for an undisclosed principal renders himself personally liable to customers in consequence. Our common carrier may be an individual, a partnership, or a company; and agents, officers, and employés may have borne active part goods for hire, — whether inland, coastwise, or abroad, outward or inward. This ingenious reasoning, founded upon the supposed incorporation into English jurisprudence of the Roman doctrine was, however, expressly repudiated by Cockburn, C. J., when the same case came up on appeal from the Common Pleas Division; and it was held that no ship-owner, who is not a common carrier upon the usual tests, can be subjected to the liabilities of a common carrier. *Ib.* 423.

¹ 2 Kent Com. 599, 600; Story Bailm. § 497; Angell Carriers, § 88; *Hastings v. Pepper*, 11 Pick. 41; *Williams v. Grant*, 1 Conn. 487; *Boyce v. Anderson*, 2 Pet. 150; *Bell v. Reed*, 4 Binn. 127; *Brown v. Clayton*, 12 Ga. 564; *Elliott v. Russell*, 10 Johns. 1; *Allen v. Sewall*, 2 Wend. 327; s. c. 6 Wend. 335.

² *Aymar v. Astor*, 6 Cow. 266; Angell Carriers, § 80.

³ C. 5, *post*; Angell Carriers, § 90, and Lathrop's note; English Acts, 7 Geo. II., c. 15; 26 Geo. III., c. 159; U. S. Rev. Sts. §§ 4281-4289.

in the bailment performance, for which, in the eye of the law, those they represent are alone chargeable to the bailor or owner, unless they themselves transcend the actual and manifest scope of their authority. Some further considerations which this idea suggests may well, then, be set forth.

§ 357. **How Agent may become solely Responsible.**—The business of a simple carrier of passengers, like a stage-coach or omnibus company, which does not presumably include the conveyance of general merchandise on hire for all who wish, may be so guardedly transacted in a particular instance that the servant alone must be deemed the special personal bailee of such packages as third parties may have confided to him to carry without his principal's concurrence. Hence, a stage-driver whose employers had not compromised themselves, has alone been held liable, and that as an ordinary bailee for hire, to parties for whom he has been in the habit of carrying parcels of money on his route for a small and uniform personal compensation.¹ But where, on the other hand, the stage company takes the profits thereof, instead of the driver, or (what would amount to the same thing) employs him on terms which recognize the perquisites for taking small packages as part of his remuneration, or in some other way assumes the business as its own, the stage company may be rendered liable in his stead as the bailee, and, upon justifying facts, as a full common carrier of the packages; supposing, of course, that the owner of the goods did not, while cognizant of such a private arrangement, contract with the driver as sole principal.² The same reasoning will apply to the conductor of a passenger railway train, who carries goods on board contrary to the prevailing practice;³ to the driver or conductor of a horse-car taking charge of parcels; to the clerk employed on

¹ *Shelden v. Robinson*, 7 N. H. 157.

² See *Bean v. Sturtevant*, 8 N. H. 146.

³ *Elkins v. Boston & Maine R.*, 3 Fost. 275.

a passenger steamboat;¹ and in numerous other cases where one has charge of another's vehicle not clearly offered for the public transportation of such property. For, in general, where a servant performs acts in violation of his master's instructions, and not, moreover, in the ordinary and apparent course of the business in which he is employed, he acts for himself, upon his own responsibility, and not for his employer;² but, as concerning acts permitted, or in the apparent scope of an authorized employment, in faith of which the bailment is made, his master must respond to others.³

Common carriers are, of course, responsible to the public for the acts of all subordinates whom they employ in the usual course and scope of the public vocation, notwithstanding any private arrangement between employer and employed, of which the bailor was not apprised. And, in general, no private understanding between a carrier and his own subordinate, whereby the latter is to receive the sole compensation for carrying certain things, can avail against a bailor for reward who suffers loss, unless the bailor is shown to have been aware of this arrangement, and to have bailed his property to the agent exclusively on the faith of it.⁴

§ 358. **The same Subject; Scope of an Agency which shall bind Principal.** — A principle often available for cases of this character is that, where the servant or employé of a carrier company is accustomed to act in violation of a rule of the company, a waiver of that rule by the company itself cannot be established, unless a knowledge of such custom and conduct, amounting to acquiescence, be brought home to some officer or subordinate who is charged with the enforcement of the rule.⁵

¹ Angell Carriers, § 85; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16.

² *Levi v. Lynn Horse Railroad Co.*, 11 Allen, 300.

³ *Satterlee v. Groat*, 1 Wend. 272; *Jenkins v. Pickett*, 9 Yerg. 480.

⁴ *Story Bailm.* § 507; *Allen v. Sewall*, 2 Wend. 327; s. c. 6 Wend. 335; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 49.

⁵ *O'Neill v. Keokuk R.*, 45 Iowa, 546.

But, whatever conflict of opinion may formerly have prevailed as to the binding force of an agent's acts and its true extent, the inclination of late cases appears to be, with reference to railway and express companies at least, to consider that the words, acts, and knowledge of the agent are admissible in evidence to bind the company only so far as relates to the particular business intrusted to him, and while engaged in that business.¹

§ 359. **Test of Responsible Employment as against Ownership; Lessee, Charterer, etc.** — Again, as to who shall be deemed the public bailee in control or management of the transportation business, the criterion is actual responsible employment, not mere ownership.² If one ferryman leases his boat to another, it is held that the former cannot be compelled to respond for an accident which occurs while the boat is in the latter's management, nor be sued in an action on the case for not maintaining the ferry.³

Similar inquiries might arise as to the employment of a vessel. For the owners of a ship or vessel are liable, where they undertake to convey merchandise on general freight; but, where the vessel is chartered for a voyage, it is rather the charterer who becomes the carrier; and, as between owner and charterer, the charter-party must determine how the mutual rights and duties lie.⁴ But, if the owner of a chartered vessel should act as its manager before the public, and fail to bring notice to the general consignor of freight, that the vessel has been let out to others, he may render

¹ *Evans v. Atlanta R.*, 56 Ga. 498; *Wells v. Am. Express Co.*, 44 Wis. 342.

² *Tuckerman v. Brown*, 17 Barb. 191.

³ *Claypool v. McAllister*, 20 Ill. 504.

⁴ *Story Bailm.* §§ 496, 501; *Nugent v. Smith*, 1 C. P. D. 423; *Sproul v. Hemmingway*, 14 Pick. 1; *Tuckerman v. Brown*, 17 Barb. 191; *Laub v. Parkman*, 1 Sprague, 343. See 1 *Schoul. Pers. Prop.* §§ 318-326; *Abb. Shipp.* 123, 223, 241; 1 *Pars. Shipp.*, 170, 274, as to the employment of ships and vessels generally.

himself immediately liable to such consignor as the ostensible carrier.¹ A ship-owner who employs the vessel on his personal account, and takes certain goods on special freight for another party's private accommodation, does not of necessity assume a common carrier's risks; for, to come within our definition, he must have held himself out as ready to transport property for persons generally.²

§ 360. **Rule applied to Railways; Letting, Chartering, etc.** — The letting or chartering of a car or an entire train on a railway may give rise to similar differences of legal construction, though the law of shipping finds here no exact parallel. Thus, where a railway company lets or charters cars absolutely to any consignor of freight, the charterer's rights and remedies must turn largely upon a just interpretation of the special arrangement. And, at all events, for an injury caused by his own bad loading, he cannot hold the railway company responsible as insurer,³ nor charge him with losses against which the contract provided, and which impute neither fraud nor mismanagement, so far as the carrier's own participation in the bailment performance extended.⁴

In shipping, however, the charterer for a voyage, once finding the vessel stanch, tight, and serviceable for his purpose, the whole control of the transportation becomes his, save so far as the owner may have furnished his own officers and crew; while the charterer of a railway car, or even of a whole train, must trust largely to the company itself, to the condition of its road, the management of other trains, and, in short, to the discretion and skill of numerous agents over whom the company, and not the charterer, exercises supervision.

¹ *Sandeman v. Scurr*, L. R. 2 Q. B. 86.

² *Story Bailm.* § 501; *Angell Carriers*, § 89; *Lamb v. Parkman*, 1 *Spragne*, 343.

³ *East Tennessee R. v. Whittle*, 27 Ga. 535.

⁴ See *Kimball v. Rutland R.*, 26 Vt. 247.

The resemblance borne by such a land carriage to a ship put under charter-party is, perhaps, closer where the entire business of one railway company, with its tracks, rolling-stock, equipments, and goodwill become leased for a certain term to another company. Here the carrying risks, as concerns patrons of the road, devolve naturally for the time being upon the lessee; though something still depends upon the manner in which the transfer of management is held out to the public, and, more generally, upon a consideration of what were the terms of the lease or contract itself. As a rule, for damage or loss occasioned on a railway which is run and operated by a lessee company in its own name, and not that of the lessor corporation, the former, and not the latter, should be held responsible.¹

§ 361. **The same Subject; Charter Restraints; Use of Motive Power, etc.** — In respect of all corporations, however, fundamental restraints, which are imposed by charter or general law, must not be disregarded. For instance, it is held that a railroad company, incorporated by law in one State, cannot lightly escape for the loss of goods which were delivered to it to be carried over part of its road to the State line, on the score of having previously leased that part of its road to a connecting corporation established by law in an adjoining State; since this would be to allow the company to divest itself arbitrarily of duties the performance of which formed the consideration of its original charter.² But, on the other hand, a corporation cannot avoid its own liability for freight injured on a connecting road leased to it, on the plea that the lease was without legislative sanction, and void;³ for it is inequitable that a com-

¹ *Pittsburgh R. v. Hannon*, 60 Ind. 417; *Leonard v. New York Central R.*, 42 N. Y. Super. 225.

² *Langley v. Boston & Maine R.*, 10 Gray, 103.

³ *McCluer v. Manchester, &c. R.*, 13 Gray, 124. And see *Feital v. Middlesex R.*, 109 Mass. 398.

pany should set up its own acts as *ultra vires* in order to escape legal responsibility.

Where one railway receives for compensation into its exclusive control, and draws over its own road, the cars of another company, it becomes strictly liable for damage done to the cars during such transit. But whether this liability be founded in an implied carrier relation, and not rather deducible from the peculiar contract of employment itself, is not clearly determined by the courts.¹ From the latter standpoint alone, there is generally found strong reason for regarding one's carriage accountability as much greater here than under mere towing contracts, which usually involve a far lighter acceptance of control by the bailee. We must, however, admit that a railway exercises more clearly a public vocation in conveying freight and passengers on its own trains than in pulling the cars of other companies; while again, if it accepts those cars with their contents, as the responsible carrier, so as to control the transportation over its own route, it should, for the contents, at least, of the cars, for what is freight, be deemed a common carrier, and for the passengers, a passenger carrier.²

Instances may arise where the arrangement for hauling another's cars by one's motive power does not involve the strict carrier relation at all.³

¹ Vermont. &c. R. v. Fitchburg R., 14 Allen, 462; New Jersey R. v. Pennsylvania R., 27 N. J. L. 100. In both of these cases the court inclined to regard the transporter as theoretically a common carrier. Cf. § 351, that towing is not deemed a common-carriage pursuit. But in towing, others have active control of what is thus carried along. In *Coup v. Wabash R.*, 56 Mich. 111, a railway company while drawing cars for a menagerie is held not to transport as common carrier.

² 25 Fed. R. 317.

³ *Coup v. Wabash R.*, 56 Mich. 111, is in point, where one's railway engine was used to draw a menagerie train of cars owned by the exhibitor. So might a teamster use his horse to help a fellow-teamster's wagon up hill. And see *St. Paul R. v. Minneapolis R.*, 26 Minn. 243, as to hire.

§ 362. **The same Subject; Case where Railway yields Partial Control.** — Permissively, doubtless, a railway company may incur the full risks of a common carrier as to property of other companies, or of its own patrons, notwithstanding it has partially yielded up its customary control and supervision, provided its undertaking be upon its customary footing of responsibility.¹ Thus, in one instance, the Supreme Court of the United States pronounced a carrier of this class responsible to the full extent, for the baggage of an army surgeon, contained in a car which was accidentally destroyed by fire, notwithstanding an army officer had selected the car, in which the baggage was placed along with a quantity of cartridges and military stores, and had further detailed a guard, superintended the loading, and finally locked up the car himself. These were precautions taken in an insurrectionary district for the benefit of all concerned; and the railway had made no objection to receiving goods for transportation under such circumstances, nor had, in fact, declined assuming the usual risks of a common carrier. No military interference with the company's control and management of the car or the train, while in actual transit, appeared in proof; nor was the destruction of the property occasioned by insurrectionists. The fire which broke out in the car, and consumed it, might possibly have been due to the explosion of the army cartridges it contained; but of this there was no positive evidence.²

¹ If the carrier is under military control, he ought to be able to refuse to transport for private parties on the usual footing of common carrier. See *Phelps v. Illinois Central R.*, 94 Ill. 548.

² "In all such cases," says Mr. Justice Field, "the liability of the common carrier attaches when the property passes, with his assent, into his possession, and is not affected by the car in which it is transported, or the manner in which the car is loaded. The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property." *Hannibal R. v. Swift*, 12 Wall. 262, 273. And see *Mallory v. Tioga R.*, 39 Barb. 488. But for a loss which is

This same rule of essential carriage responsibility, while yielding a partial control, may apply to other classes of common carriers by land or water.

§ 363. **Operation of Railways; President, Trustees, Contractors, etc.** — Carriers by railway have commonly a corporate name and organization, and the corporate business is entirely conducted by agents, each with his own sphere of duty. The board of directors, headed by the president, have commonly the managing functions of the company, which are to be exercised subject to such fundamental restraints as the charter, or act of incorporation, and by-laws may have imposed upon them; their authority being, moreover, a delegated one, and derived from the consent of the stockholders.¹ But others actually operating the road might sometimes be, instead, the proper representative managers of the company's carrier business;² as, for instance, receivers who operate a railroad under an appointment from a court of chancery; or the trustees of mortgage bonds in actual possession.³ But contractors building a railroad are not presumed to intend exercising a public employment, if, indeed, they have any right to do so;⁴ nor is the company, under such circumstances, liable as a common carrier.⁵ If, however, the company receives freight and undertakes its business before the road is completed and while running construction trains, the liability of common carrier is incurred.⁶

Where government owns a railroad whose motive power is under the exclusive control of public officers, a community shown to have been really occasioned by the customer's own fault, or the stress of military control, we presume the carrier can exonerate himself. See c. 4, *post*.

¹ See 2 Redfield Railways, § 164.

² *Paige v. Smith*, 99 Mass. 395; *Nichols v. Smith*, 115 Mass. 332; *Blumenthal v. Brainerd*, 35 Vt. 40; *Newell v. Smith*, 49 Vt. 255.

³ *Sprague v. Smith*, 29 Vt. 421; 44 N. Y. Super. 471.

⁴ *Shoemaker v. Kingsbury*, 12 Wall. 369.

⁵ *Kansas R. v. Fitzsimmons*, 18 Kans. 34.

⁶ *Little Rock R. v. Glidewell*, 39 Ark. 487; 23 Ohio St. 186.

of interests may exist between the State and those carriers whom it permits, on condition of sharing the profits of transportation, to have their trains hauled over the road. In such case it is held that the carrier's liability towards his own customer will not be diminished by the circumstance that the State cannot be sued in the courts, and made to contribute for occasioning the loss.¹

§ 364. **Partnership Responsibility in Carrier Business.** — A partnership may be created for the carrier business. And where two or more own the vehicle, and one of them, being intrusted with its management, carelessly runs it so as to injure a stranger, his fellow-partner is none the less responsible with him.² Where, again, persons have entered into a carrier partnership, by whose private terms one is to find horses and drivers for a certain distance, and the other for the remaining journey (an arrangement which formerly prevailed much in stage-coaching), they are to be deemed partners as to the public, nevertheless, and jointly responsible for the whole distance.³ So is it, too, with partners in different coaches, all employed at one office on the same business; and a contract for carrying parcels, which is made by the keeper of the coach office, will bind all the coach-owners with whom the keeper is partner.⁴

§ 365. **Connecting Carriers; Agency and Partnership Principles applied.** — This discussion takes a wider range as our modern carrier companies employing steam power are brought into view and continuous transportation increases. Where two or more railways make connecting agreements for their mutual convenience in effecting a through transportation, or railways in combination with steamboats or packets, the

¹ *Peters v. Rylands*, 20 Penn. St. 497.

² *Bostwick v. Champion*, 11 Wend. 571.

³ *Waland v. Elkins*, 1 Stark. 272; *Fairchild v. Slocum*, 19 Wend. 329; s. c. 7 Hill, 292.

⁴ *Story Bailm.* § 506; *Helsby v. Mears*, 5 B. & Cr. 504; s. c. 8 Dow. & Ry. 289; *Bostwick v. Champion*, 11 Wend. 571; *Angell Carriers*, § 93.

law of agency may supplement that of partnership so as to establish the power of one company to make a transportation contract which shall bind both or all.¹ An arrangement, moreover, between connecting carriers in the nature of a partnership or mutual agency may be shown so as to charge one for losses beyond his own route.² But such arrangements or special contracts must be established by proof; and upon the question of proof and of presumption from certain facts, contradictory rules are stated by the courts at this stage of the law, while the arrangement itself gives rise to problems of right and liability in the transportation which are intricate and perplexing. To this subject we shall recur hereafter.³

§ 366. **What Kinds of Property may be carried.**—Let us now inquire what kinds of property may be the subject of carriage. To movables or personal property is this and every bailment both logically and practically confined.⁴ But when the books speak of “common carriers of goods,” is it meant that under this expression any species of chattel property not technically “goods” must be ruled out? By no means; for, excepting that particular carriage pursuits may limit the dealing to certain kinds of chattels, whatever is capable of being bailed at all may be brought under the protection of public policy.

§ 367. **The same Subject; Money and Valuables.**—Hence, a person may be adjudged a common carrier of money, whether in specie or bills, as well as of other kinds of personal property, if such be his line of business.⁵ But the term “money” falls not well under the denomination of “goods,” or “wares,” or “merchandise;” and a vocation, publicly exercised as respects the latter only, does not embrace the

¹ Gill v. Manchester, &c. R, L. R. 8 Q. B. 186.

² Railroad Co. v. Pratt, 22 Wall. 123.

³ See c. 9, *post*.

⁴ *Supra*, § 9.

⁵ Kemp v. Coughtry, 11 Johns. 107; Allen v. Sewall, 2 Wend. 327; s. c. 6 Wend. 335; Dwight v. Brewster, 1 Pick. 50.

former. To determine, then, whether one is responsible as the common carrier of money, we must consider: (1) the true nature and scope of his business, as held out to the public; (2) the fundamental restraints which charter or legislation may have imposed upon that business. These two considerations have been applied to steamboats in several cases, so as to relieve their proprietors of responsibility as common carriers for money or bank bills specially taken by some person employed about the vessel, but without the sanction or privity of the owners and managers, or contrary to their directions. For steamboats are usually occupied in carrying passengers with their baggage, general goods, and merchandise, and possibly specie in bulk, but not bank bills;¹ and as steamboat charters commonly run, the owners might properly decline altogether to be money carriers.² Yet a company may become bound to customers by its own business methods, irrespective of the terms of its charter, so as to be estopped to deny its liability; and the acceptance of money for transit on hire by the captain, the chief representative of the company, as though acting in the scope of his employment, such acceptance being from one who intrusts the property, not on that officer's personal credit, but on the credit of the steamboat, would bind the steamboat owners as common carriers; and this, too, notwithstanding a usage of the owners, of which the consignor himself was not aware, not to accept such property for transportation.³ If, furthermore, the owners had permitted an officer of the boat to take such property for the sake of the perquisites from the parties interested, and as a partial consideration of his service to them-

¹ See *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 16, and the instructive opinion of Story, J., contained therein; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *Chouteau v. Steamboat St. Anthony*, 20 Mo. 519; *Allen v. Sewall*, 2 Wend. 327; s. c. 6 Wend. 335.

² *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186; *Sewall v. Allen*, 6 Wend. 335.

³ *Farmers' Bank v. Champlain Trans. Co.*, 23 Vt. 186.

selves, this would make the case stronger against the owners;¹ and a general usage of boats in the trade, to receive money for public transportation, would likewise bear in favor of a consignor who had supposed himself dealing with the steamboat as a common carrier of such property.² This does not imply, however, that a rule of the owners, forbidding transportation of such property, can, when brought plainly to a consignor's knowledge, be utterly disregarded with impunity whenever the captain or managing officer appears willing to violate it.

§ 368. **The same Subject.** — It is no part of a common carrier's duty to sell for his consignor the goods he transports, and remit the proceeds thereof; and should he specially undertake to do so, there might arise, on his part, a duty as factor to account for, rather than as carrier to restore, the identical money received from a purchaser. The usage, however, among inhabitants in thinly settled parts of the United States, has been sometimes to make a factotum of the steamboat captain, and employ him to take their local produce down to a distant market. Any such usage, upon which the carrier and those employing him are shown to have based their operations, and which has, in fact, been brought home from agent to principal, will bind the carrier, though it be to the extent of making him first a carrier, next a factor for barter or sale, and last a carrier for returning the proceeds; in which sense the carrier's liability for specific sale-money on transit homewards may be extraordinary, like that for a return cargo.³ A similar succession of duties is sometimes traceable where a carrier, in the scope of his employment, undertakes to make a money collection, and remit the proceeds; as where an express carries a parcel with the direc-

¹ *Ib.*

² *Ib.*; *Hosea v. McCrory*, 12 Ala. 349; *Garey v. Meagher*, 33 Ala. 630.

³ *Angell Carriers*, §§ 104-106; *Kemp v. Coughtry*, 11 Johns. 107; *Emery v. Hersey*, 4 Greenl. 407; *Harrington v. M'Shane*, 2 Watts, 443; *Taylor v. Wells*, 3 Watts, 65.

tion, "collect on delivery."¹ It will not readily be presumed that a steamboat purser or other employé who undertakes such a commission gratuitously does so within the scope of his employment so as to bind the carrier.²

§ 369. **The same Subject.** — Such a discussion tends to establish, not that a common carrier's liability for money differs from that for ordinary goods and merchandise, but that the obligation to transport or collect money is less readily deductible from the mere exercise of a public carriage vocation. As with steamboats, so, as we have seen, with stage-coaches, the transporting party is not presumed to hold himself out as a common carrier of money, though proof of contract or usage might establish the contrary in any case.³ The same reasoning will apply to other carriers, notably to railways; and indeed, at this day, money and valuables, apart from what may properly be considered baggage, are usually conveyed on our steam highways under the especial safeguard of an express carrier.⁴

§ 370. **Animals are Subjects of Common Carriage.** — Animals are "chattels" or "personal property," and, as such, may be bailed for transportation as well as custody; though the peculiar habits and propensities of living creatures give rise to novel methods of transportation, and introduce perplexing qualifications of the common carrier's liability, in respect of their conveyance, which we shall consider hereafter.⁵

¹ As to the duty of collecting on delivery, see *post*, c. 6.

² *Suarez v. The Washington*, 1 Woods, 96.

³ See 1 Salk. 282; *Bean v. Sturtevant*, 8 N. H. 146; *Shelden v. Robinson*, 7 N. H. 157.

⁴ Modern English and American legislation tends to exempt the common carrier by water from exceptional risk for specified valuables, such as gold, silver, jewelry, and precious stones, either as freight or baggage, unless the shipper notifies such articles to the carrier, so that the liability may be declared in writing. U. S. Rev. Stats., § 4281; Act 17 & 18 Vict., c. 104, § 503; c. 5, *post*.

⁵ See *Story Bailm.* § 576; *Nugent v. Smith*, 1 C. P. D. 19, 423; *Smith v. New Haven, &c. R.*, 12 Allen, 531; *Clark v. Rochester R.*, 14 N. Y.

§ 371. **Dangerous Articles, etc., as Subjects of Carriage.**—It might be worth inquiring whether, in view of the variety and vastness of our modern inland and external carrying trade, and the constant tendency of all labor to subdivision, a carrier should not be able to make still closer limitations of the scope of his employment, in order that his vehicles may not be put to uses for which they are plainly unsuitable, nor freight be thrust upon him of a sort which he neither offers to take, nor desires, nor has the facilities for handling. Thus, the transportation of petroleum in large quantities must necessitate using cars of peculiar construction, and, in any case, is attended with much hazard.¹ But, doubtless, the general obligation of a common carrier is and always has been to receive and carry and to provide the means for carrying, whatever may be offered him for reward within the scope of his calling as professed to the public. Be the subject never so dangerous or difficult, some one must be prepared to carry it for the public, and his charge may be commensurate with the pains and danger involved.

570; *Kansas Pacific R. v. Nichols*, 9 Kans. 235; *Bamberg v. South Carolina R.*, 9 S. C. (N. S.) 61, where this subject is carefully examined.

In some late American cases it is asserted that, as the early precedents contain nothing about animals, the common law may be assumed to have taken no cognizance of such property, and did not mean to include it; hence, they argue, a common carrier is not an insurer of live-stock. *Louisville R. v. Hedger*, 9 Bush, 645; *Michigan Southern R. v. McDonough*, 21 Mich. 165. See also *Baker v. Louisville R.*, 10 Lea, 304. This reasoning appears fallacious, besides being opposed to all the analogies of the law of bailment; which ought here to have expressly excepted animals, had not their carriage, so far as the nature of the case permitted, been intended to follow the usual rule of chattels or personal property. The ancient carrier's wagon did not, it is true, transport live-stock to anything like the extent of modern railway cars; but a bird in a cage, a dog fastened by a cord, or a young lamb, must occasionally have been thus transported for hire; and this at a day when, for obvious reasons, coupon-bonds could not have been thus taken, nor spinning-jennies, nor could the common-law jurists have actually had these species of personal property in contemplation.

¹ See *Brass v. Maitland*, 6 E. & B. 470; *Boston & Albany R. v. Shanly*, 107 Mass. 568; *Nitro-Glycerine Case*, 15 Wall. 524.

CHAPTER III.

WHAT CONSTITUTES BAILMENT TO THE COMMON CARRIER.

§ 372. **Duty of Carrier to receive for Transportation ; how far Qualified.** — It is fitting, at the outset of this chapter, to make inquiry concerning the extent of the common carrier's duty to receive property for transportation. By the common law every common carrier is bound to receive, without respect of persons, whatever may be offered him for transportation on hire, and to take charge of its conveyance ; that is to say, so far as comports with his means and the nature of his calling.¹ This obligation, like the corresponding one of the innkeeper, results from the public employment which one professes, and which the general good requires shall be exercised for the convenience of all who may apply, and not of one's choice customers alone.

The above statement embodies, it will be perceived, three marked qualifications of this duty to receive and convey : (1) that the party offering the chattels should offer for hire ; (2) that the common carrier's means of safe conveyance should be adequate ; (3) that such carriage should be in the line of his vocation.

§ 373. **Customer should offer for Hire.** — 1. As to the first point ; viz., that the party offering should offer for hire. It is clear that a common carrier is under no obligation to take things, except upon compensation for his service. And, as no

¹ *Riley v. Horne*, 5 Bing. 217 ; *Bac. Abr. Carriers, B.* ; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344 ; *Story Bailm.* § 508 ; *Angell Carriers*, § 124 ; *Crouch v. Great Northern R.*, 11 Ex. 742 ; *Messenger v. Penn. R.*, 37 N. J. L. 531 ; *Audenried v. Phil. R.*, 68 Penn. St. 370 ; *McDuffee v. Portland, &c. R.*, 52 N. H. 430 ; *New England Express Co. v. Maine Central R.*, 57 Me. 188.

mean offset to the great risks he must encounter, a common carrier has the most ample means of making that recompense sure; for, to say nothing of the customer's credit as a source of reliance, such a party may demand pay in advance as the condition of carrying, or, as is commonly preferred, retain by way of lien whatever he conveys for any customer, for the security of the transportation costs and charges.¹ Hence is it that, in dealings with a stranger, it is the employer that must repose confidence, far more than the party employed; a further proof of the justice of public intervention. But if his reasonable compensation be tendered him, the carrier who refuses, without assigning good reason, to carry the goods so offered, is put in default, and may be sued as for breach of a public duty;² nor need even such a tender be made, provided the party wronged by the carrier's refusal can aver and prove that he was ready and willing to pay in advance for the carriage,³ or that the carrier's misconduct made such tender useless.⁴

§ 374. **The same Subject; Reasonable Hire; Discriminating Rates.** — It is not what the carrier may arbitrarily exact, that furnishes here the criterion of compensation, but he is suable if he refuse to carry for what is a reasonable reward; for, were the rule otherwise, a carrier might easily evade his duty by asking of his customer an exorbitant sum. And where the customer, in order to induce a public carrier to perform as he is bounden, pays, under protest, a larger recompense than should be deemed reasonable, he may bring his action, as for money had and received, to recover the excess taken, just as

¹ See *post*, c. 7.

² Cro. Jac. 262; *Jackson v. Rogers*, 2 Show. 328; *Angell Carriers*, § 124.

³ Story Bailm. § 508; *Pickford v. Grand Junction R.*, 12 M. & W. 766; *Galena R. v. Rae*, 18 Ill. 488. And see *M'Gill v. Rowand*, 3 Penn. St. 451; *Fitch v. Newberry*, 1 Dougl. (Mich.) 1; *Texas R. v. Nicholson*, 61 Tex. 491. As to remedies for the carrier's refusal, see further, c. 8, *post*.

⁴ *Texas R. v. Nicholson*, 61 Tex. 491.

in other cases of extortion.¹ Injunction is sometimes granted to prevent discrimination.²

But here we should observe that the common law never went so far as to compel a common carrier to treat all customers equally. He might show special favor to individuals by taking their freight at an unreasonably low rate, or even free of charge, without being compelled to do the same by others. The fact that others were charged less was available to a particular customer only so far as it tended to show that this customer himself was charged unjustly high; and if the carrier had demanded of him only a reasonable reward for the service, this duty was well discharged.³ Whether, however, the carrier at the common law could directly afford one party undue and unreasonable facilities and advantages over another in transportation is more doubtful; and, though such a question seldom arose in the early days of our law, the true principle of justice must have been to forbid this, and, much more, any monopoly of the carriage facilities.⁴

We owe it chiefly to the modern introduction of railways, and the chartering of companies, by special acts, to perform inland transportation on a grander scale than ever before witnessed, that the legislature has been turned to checking abuses in this direction. From the restraints which acts of incorporation specially impose to general restraints under a public act is a natural progression, and we find to-day in England, and in many of the United States, comprehensive "equality statutes," which seek to prohibit every species of

¹ *Great Western R. v. Sutton*, L. R. 4 H. L. 226, 237; c. 8, *post*; 12 Fed. R. 309.

² *De Menacho v. Ward*, 27 Fed. R. 529.

³ *Great Western R. v. Sutton*, L. R. 4 H. L. 226, 237; *Baxendale v. Eastern Counties R.*, 4 C. B. N. S. 78; *Branley v. South-Eastern R.*, 12 C. B. N. S. 74; *Fitchburg R. v. Gage*, 12 Gray, 393; *Johnson v. Pensacola R.*, 16 Fla. 623.

⁴ This subject is discussed in *McDuffee v. Portland, &c. R.*, 52 N. H. 430; *Messenger v. Penn. R.*, 37 N. J. L. 531; 12 Fed. R. 309; *post*, § 380.

undue preference on the part of carriers towards particular persons or particular kinds of traffic.¹

§ 375. **The same Subject.** — But discrimination in charges between local freight and through freight is, to a certain extent, neither unjust, illegal, nor unconstitutional.² Nor would it be unfair discrimination for a common carrier to charge higher rates than usual where the risk becomes, from some pressing cause, excessive, or to exact a premium for taking property which is extra-hazardous, and requires special pains in the handling; or, in general, to fix a tariff of rates, variable on reasonable considerations, to which all of his customers are expected to conform.³ And, as an element in the just compensation due the party who transports as a public vocation, it has been said that, since the law makes the common carrier an insurer against accidents which the utmost care on his part cannot prevent, he is as much entitled to be paid for insuring the delivery of the goods at their place of destination as for the labor and expense of carrying them thither.⁴

¹ The English statutes in point are, 7 & 8 Vict. c. 3; 8 & 9 Vict. c. 20; 17 & 18 Vict. c. 31, § 2; which are well reviewed, together with the earlier cases arising upon their construction, in *Great Western R. v. Sutton*, L. R. 4 H. L. 226 (A. D. 1865). See also *West v. London R.*, L. R. 5 C. P. 622; *Baxendale v. London R.*, L. R. 1 Ex. 137. And see c. 7; § 485.

It is held in *Crouch v. Great Northern R.*, 11 Ex. 742, that a railway company cannot legally charge a greater sum for carriage of a package containing several parcels belonging to different persons, than for a package containing several parcels belonging to one person.

Transportation at discriminating rates may thus be forbidden. See *Messenger v. Penn. R.*, 36 N. J. L. 407; *Commonwealth v. Worcester R.*, 121 Mass. 561; 22 Fed. R. 404; (Ill.) 8 N. East. R. 862. And to receive goods of a later applicant, after rejecting those of an earlier one, offered under like conditions, indicates a violation of the statute. *Houston R. v. Smith*, 63 Tex. 322.

² *Shipper v. Pennsylvania R.*, 47 Penn. St. 338. See *Schneider v. Evans*, 25 Wis. 211.

³ See *Pickford v. Grand Junction R.*, 10 M. & W. 399, 422.

⁴ *Best, C. J.*, in *Riley v. Horne*, 5 Bing. 217, 220. A State act to prevent extortion and unjust discrimination by railways does not interfere with or abrogate contracts made with particular parties prior to its pas-

Common carriers, again, may guard themselves against undue competition. And, to this end, an agreement between carriers not to carry goods for less than a certain schedule rate is not to be condemned, provided the rate itself be reasonable. But a combination of carriers to prevent any one from carrying for less than their agreed rates, without reference to the reasonableness of such rates, would be oppressive to the public, and unlawful.¹ The transportation rates of railways are sometimes limited by the charter of the particular company, or by general legislation.²

§ 376. **The same Subject.** — Goods are presumed to have been received at the customary rates previously charged his patron, unless the carrier takes heed to make his change of rates known to the latter.³ And a carrier's written agreement to transport at certain rates for a specified time is a continuous offer, and binds him whenever merchandise, during that period, is tendered on those terms.⁴ But no common carrier has a right to impose conditions of shipment tending to secure to himself exorbitant compensation or other unreasonable advantage, even by indirection.⁵

sage, which would have been valid at the common law. *Chicago, &c. R. v. Chicago, &c. Coal Co.*, 79 Ill. 121.

¹ *Sayre v. Benevolent Association*, 1 Duv. 143.

² See *Camden R. v. Briggs*, 1 Zab. 403; *post*, c. 7. And see *Lamar v. New York Steamship Nav. Co.*, 16 Ga. 558; *People v. Boston, &c. R.*, 70 N. Y. 569; *Munn v. Illinois*, 94 U. S. 113.

By an important decision lately rendered (1886) a State regulation of transportation rates to and from another State is pronounced unconstitutional. *Wabash R. v. Illinois*, 118 U. S. 557. And the United States government under an act of Congress since passed (1887) enters upon the important function of regulating the inter-State traffic of railways by a board of commissioners.

³ *Fitchburg R. v. Gage*, 12 Gray, 393; *Newstadt v. Adams*, 5 Duer, 43, 45. What the carrier's proper servant states as the rate of transportation should bind the carrier. *Winkfield v. Packington*, 2 C. & P. 599.

⁴ *Harvey v. Conn. R.*, 124 Mass. 421; 10 Fed. R. 774. See further, as to compensation, c. 7.

⁵ See *Tons of Coal, in re*, 14 Blatchf. (U. S.) 453, where the improper condition of carriage was that the shipper of coal should employ shovel-

§ 377. **Carrier's Duty qualified by his Accommodations.**—

2. As to the second point. The carrier may excuse transportation, in a particular case, on the ground that his means of conveyance are inadequate for taking safely and suitably what is offered him. Like the innkeeper, he may stop receiving when his quarters are full; for he is under no obligation to provide extra carriages to satisfy an unusual demand;¹ and some carriers employ a large capital, others a small one. So, if his conveyance be utterly unfit for goods of the description offered, and he has not held himself out for taking such, the carrier can make this his excuse for not receiving them; and furthermore, he may decline immediate acceptance if the property will, at the particular time, be exposed on his route, from special cause, to extraordinary danger or popular rage,² or if he is under coercion so as not to be in the free exercise of his vocation.³

§ 378. **Carrier's Duty qualified by Scope of Vocation.**—

3. Finally. Transportation may be refused because such

lers to put coal on board, such as the carrier should designate, and at prices to be fixed by the carrier. And see *Johnson v. Tons of Coal*, 44 Conn. 548. But cf., as to wharfage privileges, *Audenried v. Philadelphia, &c. R.*, 68 Penn. St. 370.

¹ An accumulation of freight for transportation over a railway, three months in every year, so that customers are put to loss and expense by delay, does not impute blame to the railway on the ground of negligence in equipment. *Thayer v. Burchard*, 99 Mass. 508.

² 2 Show. 127, 327; *Riley v. Horne*, 5 Bing. 217; *Edwards v. Sherratt*, 1 East, 604; *Story Bailm.* § 508; *Angell Carriers*, § 125.

An insurrection or strike which attains such proportions that it has to be finally put down by the military power of the State will excuse a railroad company from receiving and carrying live-stock. *Pittsburgh R. v. Hollowell*, 65 Ind. 88. And this, notwithstanding the insurrection arose from the violence of men who had been employed by the railway, but struck for higher wages and severed their relation with the company. *Ib.*; (N. Y.) 7 N. East. R. 828; *Geismer v. Lake Shore R.*, 102 N. Y. 563. *Aliter*, where the company's employes simply refuse to work without increased wages, no acts of violence, riot, or intimidation having occurred. 28 Hun (N. Y.), 543; *Blackstock v. N. Y. R.*, 20 N. Y. 48.

³ *Phelps v. Illinois Central R.*, 94 Ill. 548.

transportation is not in the line of the carrier's vocation. Not every common carrier is a universal carrier. Passenger carriers do not, as a matter of course, hold themselves out for general freight, nor do freight carriers always undertake to carry passengers also. And much closer may one's public business be restricted, if he so wills, so offers himself, and acts consistently. "At common law," says Parke, B., "a carrier is not bound to carry for every person tendering goods of any description, but his obligation is to carry according to his public profession."¹ In accordance with such public profession, then, one might hold himself out to carry a particular description of property only, or, at all events, so as to reasonably exclude the carriage of certain kinds of chattels,—money, for instance; in which case his limitations, if openly shown and reasonable, ought to be respected by the public.

With like effect one may, and commonly does, limit his course of transit to a certain route and as between certain places, or establish it from one fixed point to another, so as to exclude freight for any or all intermediate places.² The legislation which now requires railroad companies to carry for the public equally does not lay the duty upon them beyond their respective termini, nor regardless of their limited number of way stations.³

¹ *Johnson v. Midland R.*, 4 Ex. 367, 372.

² *Ib.*; *Lane v. Cotton*, 12 Mod. 484; *Oxlade v. North-Eastern R.*, 15 C. B. N. S. 680; *Citizens' Bank v. Nantucket Steamboat Co.*, 2 Story, 49. *Quære*, whether railroad companies are bound to provide means of carrying all kinds of goods. *Supra*, § 371; *Angell Carriers*, § 125 *n.*

³ See *Pittsburgh R. v. Morton*, 61 Ind. 539. Thus has it been held that a railway cannot, by mandamus, be compelled to receive grain in bulk at its stations for transportation and delivery to an elevator or warehouse which is situated upon a switch track, connecting with its road at the terminus, but considerably beyond the actual terminus; nor be compelled to acquire the right of using the switch track which leads from their road to the elevator for the purpose of making such delivery. *People v. Chicago, &c. R.*, 55 Ill. 95. But the modern and reasonable custom of receiving grain and delivering it at an elevator upon its track should, in general, be respected by such companies; and a refusal to so receive must not be

§ 379. **Carrier may prescribe Reasonable Rules as to Receiving, etc.** — As incidental to his right of putting bounds to the scope of his profession, the carrier may promulgate reasonable rules concerning the time and methods of receiving freight. He may require delivery to be at seasonable times, and close his doors upon all customers after certain hours, or when the car or vessel ought to be ready to start.¹ Nor can a carrier be held bound to receive goods so long before the time of departure as to add unfairly to his risks;² nor to receive at unreasonable places.³ Reasonable rules, too, as to the mode of packing articles offered for transportation may be made and enforced; but not to the extent of putting the consignor to hardship.⁴ In general, while unreasonable rules are forbidden, the carrier's fair and reasonable regulations must be respected by the consignor who is made duly aware of them.⁵

§ 380. **Undue Preference, Discrimination, etc., in General.** — Under the influence of equality statutes, as already noticed, not only discriminating and unfair rates of transportation are checked and discouraged, but the undue preference of customers in other respects.⁶ Discrimination and partiality in the exercise of a public vocation our common law certainly

the subterfuge for an unlawful preference among elevator men. *Ib.*; *Chicago, &c. R. v. People*, 56 Ill. 365.

¹ *Story Bailm.* § 508; *Pickford v. Grand Junction R.*, 12 M. & W. 766.

² *Story Bailm.* § 508; *Angell Carriers*, § 125.

³ *As e. g.* to delay his train containing live-stock in order to pick up other stock, not yet at the station. *Frazier v. Kansas City R.*, 48 Iowa, 571.

⁴ See *Munster v. South-Eastern R.*, 4 C. B. N. S. 676.

⁵ *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85. For an unreasonable rule concerning the handling of freight in delivering, see *Tons of Coal, in re*, 14 Blatchf. 453.

⁶ See *supra*, § 374. Thus, under the English statutes, it is held undue preference to allow one customer to deliver his goods at a later hour than the others. *Palmer, re*, L. R. 6 C. P. 194. Or to cart, load, and unload goods free for particular customers. *Evershed v. London R.*, 2 Q. B. D. 251.

abhors; and yet the common law, independently of such salutary legislation, fails positively to forbid some practices whose mischievous tendency must undoubtedly be to favor special patrons to the detriment of others and the general public. Thus, the principle holds good, that the carrier has no right to select his patrons arbitrarily, that equal facilities on equal terms should be furnished to all; and yet, as the common law does not really prevent the carrier from taking one customer's goods at an unreasonably low rate, neither does it clearly exclude him from conferring upon that customer other practical advantages in the transportation to which competitors and the general public are not admitted.¹

¹ It is questionable whether the common law would of itself restrain undue preferences like those mentioned in the preceding note. And indeed, undue preference to an individual is sometimes defended on general principle as salutary to the public at large. L. R. 1 C. P. 588; *supra*, § 374.

The confusion of our law on this point is further illustrated in the numerous cases which have lately arisen where expressmen tried to gain equal carriage facilities on railways whose evident object was to give a monopoly to some particular company or get the business into its own control for its own advantage. It has been held in some States that for a railway to confer a monopoly of its carriage facilities upon one express to the exclusion of all others, or even better and extra facilities simply, is a grievance such as entitles an express whose packages are refused transportation to sue for damages. *Sandford v. Railroad Co.*, 24 Penn. St. 378; *New England Express Co. v. Maine Central R.*, 57 Me. 188. And see *McDuffee v. Portland R.*, 52 N. H. 430; *Audenried v. Phil. R.*, 68 Penn. St. 370. For legislation on this point, see 24 Penn. St. 378; 57 Me. 188. On the other hand, a Massachusetts case has ruled that the common carrier is not bound to continue to any expressman greater facilities than it affords the general public, even though the practical effect be to cut off privileges long enjoyed by a party and to transfer his business to the railway's own control. *Sargent v. Boston & Lowell R.*, 115 Mass. 416. And see (Cal.) 11 Pac. R. 686. And the Supreme Court of the United States has quite recently (1886) confirmed this view of the question by a decree which reverses a number of decisions made during the past ten years in the various southwestern circuits and districts, and favoring facilities to all express companies alike. *Express Cases*, 117 U. S. 1, reversing 3 McC. 147; 8 Sawyer, 603; 2 Flip. 672; 18 Fed. R., 17, etc. Railroad companies, observes the court, are not required by usage or by

§ 381. **Carrier's Waiver of Right to refuse, etc.**— While a carrier may refuse on reasonable grounds to carry goods which are offered him to transport, he can of course waive this right so as to debar himself of the defence.¹ A carrier may have good excuse for refusing the property; yet any such excuse will be waived by his actual acceptance thereof in his public capacity; while the right to demand his pay in advance for the carriage always requires a timely assertion in order that it may avail him anything.² The right

the common law to transport the traffic of independent express companies over their lines in the manner in which such traffic is usually carried and handled. They are not obliged, either by the common law or by usage, to do more as express carriers than to provide the public at large with reasonable express accommodation; and they need not, in the absence of a statute, furnish to all independent express companies equal facilities for doing an express business upon their passenger trains. 117 U. S. 1, per Mr. Chief-Justice Waite. The development of this doctrine, now so boldly and to many jurists so unexpectedly announced, remains for the future. But to the present writer it seems that this denial of equal facilities to express companies is founded in the rapid and enormous growth of the express business of late years and the complicated relation which it necessarily bears to the active transporter; a public vocation exercised by great rival companies in the cars and vehicles of another carrier, with masses of valuable packages, which the railroad or steamboat company cannot itself open and inspect, and can only in a partial sense be said to control. Were letters to be carried by any and all private expresses, these burdens of the active transporter would be still greater. But government monopolizes the mail and then makes its contract with the railroad or steamboat company; so, too, the company's convenience leads naturally to an arrangement with some one express company, and special facilities for the transportation accordingly; otherwise, if it be permitted by law to transport every article and package without the intervention of an express carrier at all. And yet, were each express, as formerly, a man with a valise, asking to travel like any other passenger, discrimination among such passengers would violate the common law, and all should be accommodated alike.

¹ *Porcher v. North Eastern R.*, 14 Rich. 181; *Riley v. Horne*, 5 Bing. 217; *Texas R. v. Nicholson*, 61 Tex. 491.

² *Galena R. v. Rae*, 18 Ill. 488. As to refusing to receive perishable goods liable to spoil from exposure, see *Tierney v. N. Y. Central R.*, 76 N. Y. 305; *Hewett v. Chicago R.*, 63 Iowa, 611.

to refuse for exposure to extraordinary danger, may thus be waived;¹ or the right to refuse at an unseasonable hour.²

§ 382. **Carrier not bound to receive from Wrongful Parties.** — We may add that a common carrier is not bound to receive goods from one who is neither their owner nor the owner's agent or bailee, clothed with authority to make delivery thereof, but rather the reverse; for a carrier must not knowingly connive at wrong,³ but on the contrary is put upon inquiry where suspicion arises.⁴

§ 383. **Carrier's Liability for Refusing to receive.** — A common carrier who violates, by refusing without good excuse to accept what is tendered him for transportation, renders himself liable to an action in case *ex delicto* as for a breach of his public duty.⁵ But it is the consignor who should thus sue him, if any one; and, though the carrier's refusal be to take to a particular consignee, the latter cannot make the grievance his own.⁶ In some instances the carrier has been compelled by mandamus to perform his duty, when the wrong suffered was by the general public,⁷ or the common-law action afforded the individual no adequate remedy.⁸

¹ *Porcher v. North Eastern R., supra*; *Hannibal R. v. Swift*, 12 Wall. 262.

² *Pickford v. Grand Junction R.*, 12 M. & W. 766.

³ *Fitch v. Newberry*, 1 Dougl. (Mich.) 1.

⁴ *Hayes v. Campbell*, 63 Cal. 143.

⁵ *Pickford v. Grand Junction R.*, 10 M. & W. 399; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Story Bailm.* § 508; *Angell Carriers*, § 124; *Galena R. v. Rae*, 18 Ill. 488; 61 Ind. 539.

⁶ *Lafaye v. Harris*, 13 La. Ann. 553.

⁷ *People v. N. Y. Central R.*, 28 Hun, 543. In *People v. Babcock*, 23 N. Y. Supr. 313, the court refused to compel by mandamus; but the carrier's refusal related to insuring fragile goods, and was, perhaps, not deemed wholly unreasonable. And see *People v. New York R.*, 22 Hun, 533.

⁸ *Audenried v. Philadelphia, &c. R.*, 68 Penn. St. 370; *People v. Chicago, &c. R.*, 55 Ill. 95; *Chicago, &c. R. v. People*, 56 Ill. 365. Injunction is permitted in 27 Fed. R. 529.

If the carrier's refusal is in breach of an actual contract to transport, he may be sued accordingly, at the injured party's option.¹

§ 384. **When the Carrier's Responsibility commences.**—At what time, we now inquire, does the common carrier's responsibility commence? This is often a delicate matter of fact to determine, for it may depend upon a variety of circumstances to which custom gives the coloring. But the main principle is the same as in other bailments: namely, that, when chattels are delivered to one as common carrier, and in that character accepted by him, the incident responsibilities at once attach; and further, that there may be a contract for the bailment before the bailment itself takes place.

§ 385. **Delivery and Acceptance considered; Carrier's Agent, etc.**—Such delivery and acceptance may be individual, or through the medium of agents. Railways and other chartered companies must needs deal with the public through officers, managers, and subordinates; vessels are manned and officered; and, for all carriage on an extensive scale, intermediate parties must be employed for various purposes. There are agents for freight, and agents whose sole concern is the locomotion; agents with directing authority, and subordinates; agents to make and receive payments, and agents to load, unload, and store things, as may be needful. Now, to constitute a delivery of property to a carrier's agent in the proper sense, the thing offered for transportation should come into the hands of the carrier's agent for receiving freight, not of any person whom the carrier may employ for other purposes. Hence, a delivery of goods simply to the deck-hand of a steamboat will not sufficiently charge the steamboat owners as carriers.² Nor is a mere clerk to be deemed

¹ *Texas R. v. Nicholson*, 61 Tex. 491; *Northwestern Fuel Co. v. Burlington R.*, 20 Fed. R. 712. And see *Pittsburgh R. v. Hollowell*, 61 Ind. 539; 65 Ind. 188.

² *Trowbridge v. Chapin*, 23 Conn. 595; *Ford v. Mitchell*, 21 Ind. 54.

so fit a recipient as the agent for freight, who employs him.¹ A stage-coach driver and the master or clerk of a steamboat may well accept freight for their employers; but even these might receive certain things to carry rather as individuals personally trusted than as agents acting on behalf of the principal carrier.² The scope of the agent's authority to receive and accept, as brought home to a consignor's notice, cannot be safely disregarded.

Delivery of goods which are to go by water to some unknown person at a wharf will not charge the wharfinger either as custodian or carrier, if no privity therein can be brought home to the wharfinger or his agents.³

§ 386. **The same Subject; Place and Manner of Delivery.** — The proper place of delivery to the carrier is a matter of much consequence; and, as a rule, delivery should be at the carrier's habitual place of receiving his customer's goods. Thus, a package of money to go by express ought to be delivered at the office counter; and its delivery at some place outside the office, even though this be to a clerk accustomed to issue receipts in the office, will not commonly suffice.⁴ Nor is a railway to be pronounced the common carrier of goods which are carelessly unloaded at the side of the track, to be picked up by the next freight train, there being neither station nor freight-agent at hand.⁵ For freight should be delivered at such a spot on the carrier's premises that the

¹ *Cronkite v. Wells*, 32 N. Y. 247. And see *Blanchard v. Isaacs*, 3 Barb. 388.

² *Supra*, § 367; *Angell Carriers*, §§ 76, 77, 85, 146. Where the purser of a steamboat takes a parcel out of favor to one who offers it and without charge, he becomes a personal bailee and does not render the steamboat company responsible; especially if he undertook besides to collect dues from the consignee. *Suarez v. The Washington*, 1 Woods, 96.

³ *Buckman v. Levi*, 3 Camp. 414; *Butler v. Hudson River R.*, 3 E. D. Smith, 571.

⁴ *Cronkite v. Wells*, 32 N. Y. 247. But see § 389, as to the custom of sending for express matter.

⁵ *Wells v. Wilmington R.*, 6 Jones, 47.

carrier or his servant charged with such affairs can at once take control and know that he is expected to assume the liability.¹

In all such cases, one's delivery of the property on the carrier's premises should be accompanied by some notice, express or implied, to the carrier or his proper agent, that the consignor intends committing it for a specific transportation. Merely placing goods where the carrier could easily have taken them is not sufficient; and a customer may well bear his own loss when he silently deposits the thing where it must needs be exposed to harm.² Not even loading the property upon the carrier's car, cart, or vessel will make the carrier responsible for its safety, if the sanction of himself or his proper servants be wanting.³

§ 387. **The same Subject; Acceptance; Way-bill, Receipt, etc.** — Actual or constructive acceptance by the carrier is, then, an indispensable element in every complete delivery. And business usage will not unfrequently call for the booking or entry of the goods by the carrier, followed by his handing over a receipt, way-bill, bill of lading, or other like token of the responsibility he has thus assumed towards the property.⁴

Yet the assumption of the common carrier's responsibility turns not upon the interchange of documents, but upon the carrier's acceptance; upon the completion of that bailment delivery in fact, actual or constructive, of which documents

¹ See *Grosvenor v. New York Central R.*, 39 N. Y. 34.

² *Selway v. Holloway*, 1 Ld. Raym. 46; *Story Bailm.* §§ 532, 533; *Packard v. Getman*, 6 Cow. 757; *Grosvenor v. New York Central R.*, 39 N. Y. 34; *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; *O'Bannon v. Southern Express Co.*, 51 Ala. 481.

³ *Leigh v. Smith*, 1 C. & P. 640; *Illinois Central R. v. Smyser*, 38 Ill. 354.

⁴ See *The Keokuk*, 9 Wall. 517; *Illinois Central R. v. Smyser*, 38 Ill. 354; *Judson v. Western R.*, 4 Allen, 520; *Lakeman v. Grinnell*, 5 Bosw. 625. A carrier is not an agent *per se* for acceptance under the Statute of Frauds. (*Mich.*) 28 N. W. 892.

afford only a more convincing proof.¹ Whenever property is received for purposes of present transportation, knowingly and willingly, by the party who professes the public employment, and the consignor relinquishes control to him accordingly, his duty as common carrier on that instant arises. It is enough that such assent be given by one the scope of whose employment authorizes him to make the delegated acceptance; and, under circumstances like these, delivery of the property to the person and at the place where such things are habitually left for the carrier, will charge him sufficiently, whether the freight money was paid or not, and notwithstanding the circumstance that writings or other token of acceptance follow at a later stage.² Even where the duty of receiving freight devolves commonly upon another, the carrier may become specially bound by the acceptance of some servant whom he has held out as duly empowered to accept for the particular occasion or purpose.³ And the fact of delivery having been plainly brought home to the carrier, no actual acceptance on his part need be shown by the customer; for negative conduct and even silence may be con-

¹ *Illinois Central R. v. Smyser*, 38 Ill. 354; *Hickox v. Naugatuck R.*, 31 Conn. 281.

² *Burrell v. North*, 2 C. & K. 680.

³ *Miller, J.*, observes on this point as follows, in *Grosvenor v. New York Central R.*, 39 N. Y. 34, 37: "Persons dealing with railroad corporations, and parties engaged in the transportation of freight, have a right to consider that those usually employed in the business of receiving and forwarding it, have ample authority to deal with them. It is enough to establish a delivery, in the first instance, to prove that a person thus acting received and accepted the property for the purpose of transportation, and even although it subsequently appears that another employé was actually the agent having charge of this department of business, yet the company who sanction the performance of this duty by other persons in their employment, and thus hold out to the world that they are authorized agents, are not at liberty to relieve themselves from responsibility by repudiating their acts." In this case it was considered that notice to a baggage-master might, under the circumstances, suffice to complete the delivery of freight.

strued into the assumption of that duty which the public servant has no right to renounce at discretion.

§ 388. **Effect of Usage or Special Contract in determining Delivery.**—Goods which are delivered according to the carrier's established usage have been pronounced fully delivered in various instances, though this were under circumstances not clearly importing acceptance on the carrier's part. For example, where freight for water-carriage was carted through the gate into the private dock of a steamboat company, and left on the usual place for loading up the vessel, this was held to constitute a good delivery and acceptance for transportation, although neither the carrier nor his agent were shown to have received any distinct notice or made any distinct acceptance thereof; and the constant usage of the company to receive property at its dock for transportation in this manner, and without a special notice of the deposit, was deemed equivalent to a public offer.¹ Or again, in the case of a railway whose receiving agent had adopted the custom of receiving for shipment cotton which was left in a street by the side of the platform, or in the railroad cotton-yard.² But precedents like these tend to enfeeble the main principle we are discussing, and ought not to receive an implicit credence; though all must concede that special contracts in this respect, between a carrier and his patrons, and, in like manner, usage, whose operation is that of a special contract, may be found to color the mutual delivery and acceptance in a given instance.

Business methods go far towards determining the point of time at which the thing passes into the carrier's control with his assent for present transit purposes. And, provided the circumstances of a case warrant the inference that a certain

¹ *Merriam v. Hartford R.*, 20 Conn. 354. There was in this case evidence to show that the cartman called out that he had freight. to some one on the boat, who responded, "All right;" but who this person was did not appear.

² *Montgomery R. v. Kolb*, 73 Ala. 396.

carrier has accepted for present transportation in his public capacity, the place of acceptance becomes immaterial; for it may be in or out of his office, store, depot, or warehouse, and either with or without being accompanied by written formalities. Thus, freight placed in a railway car for present shipment, with the company's assent, becomes as effectually delivered to the company as though it were taken to the freight-house, or delivered upon the depot platform. For a car so loaded with freight in the company's control, and remaining upon a side-track, the railway may, by virtue of an oral acceptance, become liable as a common carrier, even though no bill of lading of the freight be yet signed.¹ And yet, had these goods been placed in the car without some such oral assent, it would justly be said that no bailment liability, and especially no common-carriage liability, was incurred by the company.

§ 389. **Custom of Sending to receive Freight.**—Expressmen and other carriers, too, who send their servants habitually to the customer's dwelling or store to receive goods, shift, by so doing, their place of carriage acceptance, and become there as fully bound as though delivery had been made on their own business premises.²

In some instances the carrier's duty of acceptance requires him to come and select, or to take a certain quantity from a heap, rather than merely to accept what the owner may bring him; in which case he must perform according to the mutual understanding, and neither beyond nor short of what the consignor directed.³

§ 390. **Where Carrier is Bailee in another Preliminary Capacity.**—It is, however, observable that carriers are often to be deemed at a certain posture of the case warehousemen or

¹ *Illinois Central R. v. Smyser*, 38 Ill. 354; 89 Ill. 244.

² *Boys v. Pink*, 8 C. & P. 361; *Davey v. Mason*, 1 C. & M. 45; *Phillips v. Earle*, 8 Pick. 182.

³ *Cooper v. Berry*, 21 Ga. 526. Railway companies have in some instances established receiving offices for freight, as a result of competition. See *L. R. 6 C. P. 194*.

simple custodians with respect to property which has been placed in their charge. And, whether one holds himself out as blending these two professions in practice or not, a person or company exercising the public vocation, whose custody of goods continues long before or long after the transit, should be charged, not as common carrier, but in the less onerous capacity of a hired or gratuitous bailee. Railway freight depots, where much property is necessarily held, from one cause or another, on long storage, furnish instances where the distinction is applicable. In all such cases the just intent of the transaction must guide us towards determining what bailment relation is sustained at any particular stage. For while every public carrier may doubtless refuse to receive property when tendered him for transit unreasonably early, such carrier may accept, if he choose, on the just understanding, express or implied, that, until he is prepared to load aboard for the journey, his own liability shall be simply that of warehouseman or hired custodian, or, if the case were freed utterly from the consideration of recompense (a conclusion which ought reluctantly to be accepted in any case where advance facilities are provided for goods which are ultimately to be transported for a recompense), as a gratuitous bailee. This previous storage may be of much convenience to the bailor; yet early delivery of freight is not without its advantages to those who are to pack and stow it for the transit; and hence, as a rule, the carrier who accepts is taken to accept for present transportation at his own convenience, and accordingly as a party at once liable as common carrier, even though the goods lie at the wharf, on the platform, in the freight-house, at the depot, or elsewhere, and are not yet laden or stowed in condition for the transit to commence.¹

¹ Robinson v. Dunimore, 2 B. & P. 416, 419; Story Bailm. §§ 534-537; Fitchburg R. v. Hanna, 6 Gray, 539; Moses v. Boston & Maine R., 4 Fost. 71; Blossom v. Griffin, 3 Kern. 569; Clarke v. Needles, 25 Penn. St. 338; Michigan Southern R. v. Shurtz, 7 Mich. 515.

This rule of carriage delivery and acceptance, we should feel assured, is no arbitrary or capricious rule, but one which is shaped by actual circumstances. And wherever the bailment relation which follows the transfer of possession imports, upon all the evidence, no duty of immediate or present transportation on the bailee's part, but rather that he shall await his consignor's further acts or instructions before putting the goods on their course, and the delay is for the customer's convenience instead of his own, or by way of a license to use his premises for shelter, the position of the bailee, though he be a public carrier by profession, will continue meantime that of warehouseman or simple bailee, and not of carrier.¹

§ 391. **The same Subject; Acceptance as Common Carrier, etc.**—But the presumption arises, where goods are delivered and accepted by a common carrier in the ordinary course, and nothing remains for the consignor to do to them, that no intermediate storage is requisite unless it be for his own convenience; that the acceptance is, in fact, to forward forthwith, or solely as common carrier.² How the common carrier may be changed into a custodian or warehouseman, at the journey's end, because of some delay in delivery over to the proper consignee, we shall consider hereafter.³

The same general doctrine of a preliminary bailment duty applies to carriers who act as forwarders; as, for instance, to

¹ *Barron v. Eldredge*, 100 Mass. 457; *Angell Carriers*, § 134; *Finn v. Western R.*, 102 Mass. 284; *St. Louis R. v. Montgomery*, 39 Ill. 335; *Spade v. Hudson River R.*, 16 Barb. 383. An understanding that goods received shall be held as part of a lot to await transportation until the whole is delivered will render the carrier liable only as warehouseman until he has the whole lot; even though he be authorized (not directed) to carry in portions. *Watts v. Boston & Lowell R.*, 106 Mass. 466. And see (*Tex.*) 1 S. W. Rep. 446.

² *Moses v. Boston & Maine R.*, 4 Fost. 71; *Nichols v. Smith*, 115 Mass. 332; *Hickox v. Naugatuck R.*, 31 Conn. 281; *Grand Tower Co. v. Ullman*, 89 Ill. 214.

³ *Post*, c. 6.

successive companies in a line of connecting railways.¹ As the warehouseman or forwarder of goods, with a right to charge for his services, the common carrier is bound to exercise, at all events, ordinary care and diligence.² The pertinence of our present distinction is strongly shown in case goods are accidentally destroyed by fire while in the carrier's possession, but before or after the actual transit; accidental fire being a casualty against which one insures as a common carrier, but not as a hired custodian or warehouseman.

§ 392. **Carrier need not forward where Destination is unknown.**—Where the carrier has no means of knowledge, by marks on the goods or otherwise, as to their destination, or finds them by mistake misdirected to some place which has no existence, he is not bound to undertake their transportation, until properly informed.³

§ 393. **Carrier usually loads and stows.**—In general the carrier is to determine how and where to stow goods received by him for carriage.⁴ If he permits the loading to be done by the consignor or his servants, the law treats them, for this purpose, as agents of his own, and subject to his direction, save so far as it might appear that the transfer of the consignor's control was still kept in abeyance. A carrier cannot evade his public responsibility for property actually taken into

¹ *Post*, c. 9. And cf. *Judson v. Western R.*, 4 Allen, 520; *Michaels v. New York R.*, 30 N. Y. 561.

² *Northern R. v. Fitchburg R.*, 6 Allen, 254; *Nichols v. Smith*, 115 Mass. 332; *Maybin v. South Carolina R.*, 8 Rich. 240; *supra*, § 101. But a railway company, prohibited by its charter from charging for storage, would, it is held, be liable as a mere gratuitous bailee under circumstances like the present. *Michigan Southern R. v. Shurtz*, 7 Mich. 515.

³ See *O'Rourke v. Chicago R.*, 44 Iowa, 526; *Erie R. v. Wilcox*, 84 Ill. 239. The consignor's duty in this respect will be presently considered. As to misdirection and its effect, see c. 6, *post*; *Stimson v. Jackson*, 58 N. H. 138; *Congar v. Chicago R.*, 24 Wis. 157.

⁴ *Hannibal R. v. Swift*, 12 Wall. 262; *Merritt v. Old Colony R.*, 11 Allen, 80; *May v. Hanson*, 5 Cal. 360; *Illinois Central R. v. Smyser*, 38 Ill. 354. Cf. *The Keokuk*, 9 Wall. 517.

control for carriage, on the plea that the consignor or others loaded it upon his vehicle;¹ for where no fraud is practised upon him he is considered as waiving all faults of loading by others when he accepts the property so loaded on the undertaking to transport it, having the opportunity to inspect and rectify for himself.²

§ 394. **Delivery and Acceptance illustrated; Carriage by Water; Bill of Lading, etc.** — The carriage of freight by water affords an illustration of our rule of delivery and acceptance. Whenever property comes into control of the water carrier's servants for present transportation, the carrier risk attaches; and this does not wait for the thing to be actually put on board where, as constantly happens, freight is received by the carrier on a wharf for loading up the vessel; or so as to be taken out in lighters while she lies in the stream at anchor; or even at the shipper's warehouse; provided the loading and stowing be under the carrier's direction.³ Still more clearly is the vessel's liability fixed if the carrier has receipted for the goods.⁴ But acceptance must be brought home to the master, or other authorized representative of the vessel; and while full custody may be taken by the carrier, apart from giving receipts or a bill of lading,⁵ no bailment for carriage is to be presumed from the fact that the shipper himself, without the carrier's sanction, loads his goods on a lighter which the carrier is not using.⁶

¹ *Merritt v. Old Colony R.*, 11 Allen, 80.

² *Kinnick v. Chicago R.* (Iowa), 29 N. W. 772.

³ *British Columbia Co. v. Nettleship*, L. R. 3 C. P. 499; *The Barque Edwin*, 24 How. 386; *Angell Carriers*, § 129; *Story Bailm.* § 534; 28 Fed. R. 202. Under such circumstances, if goods are delivered and accepted in a lighter which the carrier hires to bring goods out to his vessel, and the lighter explodes before it reaches the ship, the carrier must respond for the loss of goods on board, whatever his own remedy against the lighter. 24 How. 386; next c.

⁴ *Ib.*; *Greenwood v. Cooper*, 10 La. Ann. 796.

⁵ *Lakeman v. Grinnell*, 5 Bosw. 625; 64 Tex. 615.

⁶ *The Keokuk*, 9 Wall. 517; *Packard v. Getman*, 6 Cow. 757.

Where, too, there has been no actual delivery of goods, the carrier cannot be concluded by pretended bills of lading which the master signs, in fraud of his employers, through connivance with the consignor.¹

§ 395. **Further Illustration ; Carriers by Ferry.** — A ferryman (and the same would hold true of ferry companies) is usually liable as common carrier, from the time he admits teams upon one slip, until they are off the other.² And he is bound to keep the ferry slips in good order, as well as the boat itself.³ He is said to have the absolute right to direct what position persons and their carriages shall take on the boat without reference to priority of arrival.⁴ Both in receiving and delivering, it is the ferryman's duty to see that the teams and their contents, and the animals attached to the teams, are safely driven ; to which end he may drive a team himself, or unharness, or unload it while on his premises ; and if the ferryman lets the party drive his own team off or on, or remain in charge, he makes him, to a certain extent, the ferryman's agent.⁵ Yet the driver who has not actually parted control of his team to the ferryman is not without a considerable share of responsibility for its safety, as in the corresponding instances, where one travels upon a cattle-car, in

¹ *Grant v. Norway*, 10 C. B. 665. But whether this rule shall avail absolutely as against an innocent purchaser or holder for value, there has been much conflict in the authorities ; some holding that such acts of an agent acting within the apparent scope of his authority shall, by estoppel at least, bind the carrier ; while more hold to the contrary, denying liability, because of the agent's fraud and want of authority. *Ib.* See *Sears v. Wingate*, 3 Allen, 103 ; *Baltimore & Ohio R. v. Wilkens*, 44 Md. 11 ; *Armour v. Michigan Central R.*, 65 N. Y. 111 ; and the authorities amply cited in these cases ; 108 Penn. St. 529 ; 93 N. C. 42. The latter view is sustained by the Supreme Court of the United States. *Pollard v. Vinton*, 105 U. S. 7 ; 18 How. 182. And see c. 5, *post*.

² *Willoughby v. Horridge*, 12 C. B. 742 ; *Miles v. James*, 1 M'Cord, 157 ; *May v. Hanson*, 5 Cal. 360.

³ *Ib.*

⁴ *Claypool v. McAllister*, 20 Ill. 504.

⁵ *May v. Hanson*, 5 Cal. 360 ; *Miles v. James*, 1 M'Cord, 157.

charge of his property ;¹ nor, indeed, would the animal's own nature and disposition be immaterial in such an issue of responsibility.²

§ 396. **Further Illustration ; Delivery by Apparatus, etc.** — Other illustrations of delivery may be cited where pipe, tackling, or other apparatus is used ; the nice point of distinction being whether the carrier or the consignor controls such apparatus when a loss occurs.³

§ 397. **Duty of Consignor in making Delivery.** — With regard to bailment delivery to a common carrier, the consignor of goods and chattels has correspondent duties to those we have now considered which rest upon the carrier himself. What the consignor wishes transported should be offered for that purpose to the right carrier at a reasonable time. If offered as freight, he should be ready to make compensation in advance upon the carrier's request ; or if as baggage, to pay his passenger fare under like circumstances, by procuring a ticket, or otherwise ; while, on the other hand, it is for the carrier himself, who wishes his hire settled in advance, to decline receiving the goods until paid, and generally to make known his reasons for declining the service, where acceptance is refused.⁴ The consignor should see that what he sends is plainly and legibly marked in some way, so that the place of destination may be readily known, and the party identified who should receive the goods ;⁵ though an identification by marks, and description in bills of lading or way-bills, or by check or other token, will often suffice for practical purposes, as transporta-

¹ *White v. Winnisimmet Co.*, 7 Cush. 155.

² See next c.

³ Thus, where cargo is to be delivered from the lighter at the side of a ship by means of slings and tackle. *The Cordillera*, 5 Blatchf. 518. And in delivering wheat from a warehouse through a pipe into the vessel. *The Winslow*, 4 Biss. 13.

⁴ *Story Bailm.* § 508; *supra*, § 374.

⁵ *The Huntress*, Daveis, 82, per Ware, J.; *Southern Express Co. v. Kaufman*, 12 Heisk. 161; *supra*, § 392.

tion business is now conducted.¹ Above all, he should not misdirect what he sends.²

Again, the consignor should offer his goods properly packed according to their nature and condition; for he is liable for losses directly due to his own bad packing³ as well as his own misdirection or misdelivery.

So, too, is it the consignor's duty to make no false pretensions of ownership, nor practise deception as to the contents of the package he delivers. He should not only have his goods well packed, according to their nature and the character of the journey, but, as a certain class of cases indicate, acquaint the carrier, in some way, of facts not patent on inspection, which necessarily enhance greatly the usual risks of conveyance. Money and precious stones, for instance, should not be done up to look like cheap merchandise, nor glass and explosives as articles which bear rough handling.⁴ And, for giving to a carrier nitro-glycerine, or other highly dangerous substance, so packed that its injurious character does not appear on ordinary inspection, the consignor must bear whatever damage the carrier or third parties may sustain in consequence. Fraud is not the needful basis of such liability; but the shipper's negligence often proves sufficient to charge him.⁵ The carrier must, however, on his behalf, have exercised, in all these cases, such care as befitted

¹ *Bradley v. Dunipace*, 1 H. & C. 521; *Finn v. Western R.*, 102 Mass. 283, 290; *Krender v. Woolcott*, 1 Hilton, 223. See *Rome R. v. Sullivan*, 25 Ga. 228; *Forsythe v. Walker*, 9 Penn. St. 148; *post*, as to termination of carrier's risk, c. 6.

² *Stimson v. Jackson*, 58 N. H. 138.

³ *Baldwin v. London R.*, 9 Q. B. D. 582; *Shriver v. Sioux City R.*, 24 Minn. 506.

⁴ *American Express Co. v. Perkins*, 42 Ill. 458; *Angell Carriers*, § 213; *Munster v. South-Eastern R.*, 4 C. B. N. S. 676; *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Boston & Albany R. v. Shanly*, 107 Mass. 568; *Nitro Glycerine Case*, 15 Wall. 524.

⁵ *Ib.* And see *Pierce v. Winsor*, 2 Sprague (U. S.) 35.

the apparent nature and worth of the article committed to him.¹

§ 398. **Rule where Consignor deceives as to Contents of Package, etc.** — Indeed, the carrier's duty is limited to transporting things according in character to what he may have reasonably supposed them to be. It was remarked by an English judge, in one of the earlier cases, that a common carrier might refuse to take goods, unless the owner would tell him what they were.² But the later decisions reject this as too broad a proposition in his favor; and, declining to make an inquisitor of the carrier, they leave him to judge, in general, by appearances, and by what the shipper may have chosen to reveal.³ Hence, if a shipper studiously conceals the true contents of the package, or marks it, or makes it up, as something different from what it really is, or misrepresents its value or nature, the carrier may set up such misconduct in defence to a loss thereby induced.⁴

The limitations of this doctrine will be discussed hereafter;⁵ but we here add that it is held that, when the appearance of the package is such as to arouse the carrier's suspicion that it is extra-hazardous, he may require a knowledge of its contents, as a pre-requisite of carrying it;⁶ since only latent matters could justify him in setting up the shipper's negligence or deception, by way of an excuse for loss or injury.⁷ So the carrier may ask shippers the value of packages ten-

¹ *Ib.* But as to the duty of acquainting the carrier with the value of wearing apparel carried as baggage, the rule appears less stringent than in ordinary freight. See *post*, Part VII. c. 4; *Railroad Co. v. Fraloff*, 11 Otto, 21.

² *Best, C. J.*, in *Riley v. Horne*, 5 Bing. 217.

³ *Crouch v. London R.*, 14 C. B. 255; *Nitro-Glycerine Case*, 15 Wall. 524.

⁴ *Relf v. Rapp* 3 W. & S. 21; *Phillips v. Earle*, 8 Pick. 182.

⁵ See next c.

⁶ *Field, J.*, in *Nitro-Glycerine Case*, 15 Wall. 524.

⁷ See *New Jersey R. v. Pennsylvania R.*, 27 N. J. L. 100; *Wiggin v. Boston & Albany R.*, 120 Mass. 201.

dered with a view to determining whether extra rates should be charged, and he may rely upon the answer given, by way of limiting his risk, unless disproof were patent;¹ while, on the other hand, the shipper who has practised no deception or improper concealment is under no obligation to volunteer a statement of contents or value.²

§ 399. **Consignor should make Full Delivery.** — Finally, the consignor is bound to make personally, or through his agents, a full delivery, or, in other words, to yield possession and immediate control of the property to the carrier. What falls short of this, so as to import rather a retention of custody on his part, or the trust of his own agents, instead of the carrier, leaves a hiatus in the bailment delivery; for the carrier must have been trusted, in order to become fully liable. Hence, delivering a parcel to a friend, with instructions to have the common carrier book it for London, leaves the friend the sole responsible bailee in case of loss, if, instead of so doing, the latter puts the parcel into his own carpet-bag, and carries it as part of his own baggage to save freight.³

Retention of custody by the owner, or a bailment too unconfiding to justly subject the bailee to extraordinary hazard, may, however, be better affirmed at all times of baggage, whose carriage is at best but incidentally paid for, than of goods delivered as freight. For the latter sort of transportation a common carrier will not readily be excused from full responsibility at our law, simply because the owner or his servant happens to go with them. Nor does the owner's mere supervision of what is conveyed antagonize the mutually intended transfer of bailment custody to the carrier.⁴ Thus,

¹ Story Bailm. § 567; *Little v. Boston & Maine R.*, 66 Me. 239. See *Lebean v. General Steam Nav. Co.*, L. R. 8 C. P. 88.

² *Merchants' Despatch Trans. Co. v. Bolles*, 80 Ill. 473; *Dwight v. Brewster*, 1 Pick. 50; Story Bailm. § 567.

³ *Miles v. Cattle*, 6 Bing. 743. And see *Dunlap v. International Steamboat Co.*, 98 Mass. 371. As to baggage, see Part VII. c. 4.

⁴ See Angell Carriers, §§ 113, 142.

the supercargo in a vessel, or the drover travelling by rail with his cattle, leaves the carrier a common carrier and insurer still of the goods or animals whose conveyance he has in truth undertaken.¹ Nor, once again, does baggage which has been stowed with the carrier cease to be at the carrier's risk, because the traveller sits where he can keep his eye upon it.²

§ 400. **Theory of Mixed Responsibility where Consignor accompanies the Goods in Transit.** — But, whether the case be that of baggage or freight, there arises, doubtless, a sort of mixed responsibility for all property in transit, over whose custody the passenger or the shipper or his agent retains any practical control. This mixed responsibility in public carriage the courts do not yet very happily decompose; but perhaps the best solvent would be found in that universal principle that one who seeks to recover from another for a loss or injury inflicted upon him in person or property must not, by his own want of ordinary care or misconduct, appear to have contributed to that loss or injury. As in packing, marking, and bringing his goods into the possession of the public carrier for a particular undertaking towards them, so, too, in partaking of their care on the journey, if he does so, the customer is bound to be honest, and to bestow ordinary diligence within whatever happens to be the sphere of his chosen opportunity.³ For, as will be shown more fully in the next chapter, the fraud or the negligence of the consignor contributing to a particular loss may, under proper circumstances, be set up by the carrier in his own exoneration.

¹ See *Wilson v. Hamilton*, 4 Ohio St. 722; *Evans v. Fitchburg R.*, 111 Mass. 142; *Sneeshy v. Lancashire R.*, L. R. 9 Q. B., 263; s. c. 1 Q. B. D. 42. And see next chapter, as to transporting animals. But cf. *East India Co. v. Pullen*, Stra. 690.

² *Robinson v. Dunmore*, 2 B. & P. 416; *Cole v. Goodwin*, 19 Wend. 251; *Le Conteur v. London R.*, L. R. 1 Q. B. 54; Part VII. c. 4. And see, as to a permissive loading on board by the consignor, *supra*, § 362; *Hannibal R. v. Swift*, 12 Wall. 262.

³ See *per curiam*, in *Talley v. Great Western R.*, L. R. 6 C. P. 44.

CHAPTER IV.

BAILMENT RESPONSIBILITY OF THE COMMON CARRIER.

§ 401. **Perilous and Exceptional Responsibility assumed; but Duty is that of Bailee for Hire.** — Upon the instant a thing is delivered on hire to a common carrier for present transportation, and accepted by himself or his agents in conformity with such an undertaking, the duties and rights of a public relation will attach thereto at the common law. Whether it remains in quiet custody until he can perform the journey, or is ready to be sent at once, whether it requires to be loaded by the carrier upon a car or vessel and stowed away, or is already on board and in place, the carrier has now assumed towards the chattel thus consigned to him a perilous and exceptional responsibility, which must in general continue until the thing safely reaches its destination, and his carriage undertaking, under the bailment and bailment contract, becomes fully performed.

But the responsibility or risk incurred at the common law is one thing, and the duty another. To separate these two ideas will be found convenient, as our investigation proceeds. As to his duty, the common carrier is a bailee for hire, bound to the ordinary or average standard of performance. The legal responsibility, however, transcends all considerations of care and diligence, on his part, as we shall presently see; making him an insurer, virtually, in many instances, aside from the qualifying elements to be noted in our next chapter.

§ 402. **Bailment Duty first considered; Loading, Propelling Force, Vehicles.** — Let us first observe what is the carrier's duty, in exercising his public vocation. It is observable, as to the transit obligations, that a common carrier is bound to

have his customer's property fitly loaded and stowed upon the vehicle, and to carry it in vehicles which are reasonably strong, tight, and serviceable for the purpose intended; this, however, only with reference to the nature and value of the chattel as disclosed to the carrier by its appearance or otherwise, and applying the ordinary or average standard of care and diligence in the particular calling. The propelling force must be fit and adequate for the common emergencies of the particular transit; and the carrier must man, equip, and provide the propelling facilities with reasonable prudence and foresight.¹ For transportation by horse and wagon, the carrier must supply ordinarily fit animals and teams, competent drivers, and good harness; besides providing, if the journey be a long one, the means of feeding, resting, and changing his beasts. In transportation by railway, the cars furnished should be serviceable, the road-beds secure, the locomotive a fit one, placed under the control of a competent engineer, and supplied with fuel and water, the train with its equipments and the tracks kept in good condition, and well looked after by proper subordinates in charge. Transportation by water demands a vessel stanch and tight, proper officers, and a proper crew; steering apparatus, sails and masts all in good order; a proper supply of provisions and water; and, if the vessel be propelled by steam, safe engines and machinery, persons skilled in managing them, fuel, and the other usual appliances. Where there will be no likely opportunity on the transit to refit, refurnish, revictual, or otherwise supply the wants of the entire journey, the carrier should with foresight provide, before starting, whatever may be desirable. In manning and equipping, the carrier need not provide against unusual exigencies, but only those which ordinary prudence forecasts; for, in these and all other respects, his obligation is presumably commensurate with

¹ *Branch v. Wilmington R.*, 77 N. C. 347; *supra*, § 377.

the exercise of a reasonable care and discretion, such as those ordinarily careful in the vocation would bestow.¹

It is well settled that a water carrier warrants, by implication, that his vessel is reasonably fit for the particular freight when she sails, and not merely that he has honestly endeavored on his part to make her fit;² to which end he is bound to have the vessel often and thoroughly inspected to make sure of its condition, and must cease using it wholly when it becomes unsafe for its purpose beyond the reach of further repair.³ And a like warranty probably holds good of any kind of vehicle for the public carriage of property on hire.⁴

A bailment for steam conveyance does not permit the substitution of horse-power or a sailing-vessel; and, as a rule, the mode of carriage is taken to be limited and defined by the carrier's public undertaking.⁵

§ 403. **Carrier's Duty in Transporting.**—In carrying the goods to their destination, the common carrier and his servants are bound to transport safely, with reasonable despatch, and by the prescribed or his customary route.⁶ He must take care that the goods be kept, after their kind, well stowed, secured, and sheltered throughout the transit, so as not to

¹ Story Bailm. § 509; *Propeller Niagara v. Cordes*, 21 How. 8; *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Schmidt v. Chicago R.*, 83 Ill. 405.

² *Lyon v. Mells*, 5 East, 428; *Kopitoff v. Wilson*, 1 Q. B. D. 377; *Steel v. State Line Steamship Co.*, 3 App. D. (H. L. Sc.) 72; *Stanton v. Richardson*, L. R. 9 C. P. 390; *The Northern Belle*, 9 Wall. 526.

³ *The Northern Belle*, *supra*.

⁴ See *Blackburn, J.*, in *Readhead v. Midland R.*, L. R. 2 Q. B. 412; *Kopitoff v. Wilson*, 1 Q. B. D. 377, 381; *Gibson v. Small*, 4 H. L. C. 353. But by being fit or (as it is said of a vessel) "seaworthy," we mean ordinarily fit, and not so exceptionally serviceable that the vehicle may encounter safely every irresistible peril. See *Amies v. Stevens*, 1 Str. 127.

⁵ *Fraser v. Telegraph Construction Co.*, L. R. 7 Q. B. 566; *Merrick v. Webster*, 3 Mich. 268.

⁶ Story Bailm. § 509; *Raphael v. Pickford*, 5 M. & Gr. 551; *Hales v. London R.*, 4 B. & S. 66; *Powers v. Davenport*, 7 Blackf. 497; *Harris v. Northern Indiana R.*, 20 N. Y. 232; 37 La. Ann. 468.

suffer undue waste, decay, or diminution; that the vehicle and motive power fail not from want of skill or fair precaution; that the transit be made over clear tracks or an unobstructed course, so far as ordinary discretion on his part can make it such; and, at the last, that the property be delivered over rightfully, with reasonable despatch, and according to the just sense of his particular bailment undertaking.¹ But a carrier is not obliged to carry goods strictly in the order in which he received them, and without regard to their character, condition, exposure to depredation, or liability to perish;² nor, on the other hand, to favor unduly one kind of property to the detriment of another.³ And while deviations from the agreed or customary route, if made without good excuse, must place the carrier in the predicament of having to answer for all the ill consequences which may ensue from his breach of contract, a deviation from necessity, especially in a sea voyage, ought to be and is more lightly visited.⁴

§ 404. **Carrier's Duty in Case of Disaster or Delay.** — Should disaster overtake him during the transit, the common carrier is bound to lessen its injurious effects by pursuing a reasonable course of conduct towards the property placed under his charge for carriage.⁵ He ought, if the goods be still worth

¹ Story Bailm. § 509; *Lyon v. Mells*, 5 East, 428; *Hastings v. Pepper*, 11 Pick. 41. See c. 6, *post*, as to final delivery.

² *Peet v. Chicago R.*, 20 Wis. 594; *Marshall v. New York Central R.*, 45 Barb. 502; 76 N. Y. 305.

³ *Dixon v. Chicago R.*, 64 Iowa, 531.

⁴ Story Bailm. § 509; *Davis v. Garrett*, 6 Bing. 716; *The Maggie Hammond*, 9 Wall. 435; 11 Fed. R. 179; *Crosby v. Fitch*, 12 Conn. 410; *Hand v. Baynes*, 4 Whart. 204.

⁵ Story Bailm. § 509; *Davis v. Garrett*, 6 Bing. 716; *Powers v. Davenport*, 7 Black. 497; *Hales v. London R.*, 4 B. & S. 66; *Phillips v. Brigham*, 26 Ga. 617. In *The Schooner Sarah*, 2 Sprague (U. S.), 31, Sprague, J., says that in determining the necessity of a deviation from the course of a sea voyage, and running into port to avoid disaster, "much must be left to the judgment and discretion of a master." But here it was decided, on the proof, that the vessel was actually in an unseaworthy condition. Where a vessel was long detained in port by an excused calamity, and a

transporting, to repair the vehicle and then proceed on his way, or else to transship them; if delayed long, he should temporarily store and shelter them; and he should neither needlessly abandon the goods nor expose them carelessly to damage; all this according to his opportunity and in the exercise of ordinary discretion and prudence under the peculiar exigency. And, after the same measure of sound good sense, should he apply the proper means of preserving from destruction whatever may remain; as in drying, repacking, repairing, and separating the spoiled from the unspoiled.¹ But he would not be justified in sending forward, merely for the sake of earning his hire, that which plainly is too far damaged to be worth to the owner the cost of further transportation;² but should rather send for instructions, or else sell it on the spot for what it will bring; for he is bound to regard his customer's interests as well as his own in such a calamity. Nor, again, is the carrier bound to suspend his journey to the undue prejudice of other shippers, in order that injury to the property of one consignor may be repaired; for the general welfare of the property in his vehicle must always be considered.³ The carrier, furthermore, has no right to transship such goods as he may have preserved, at so high a rate that it will not be for the owner's interest to receive them.⁴ Transshipment, in fact, though highly desirable oftentimes, as in furtherance of the original purpose of transportation, must be pursued only when practicable and promising a real benefit to the customer.

perishable commodity was kept in the hold, instead of being discharged, the carrier was held chargeable for the damage. *The Jason*, 28 Fed. R. 323. And see *Kinnick v. Chicago R. (Iowa)*, 29 N. W. 722.

¹ *Propeller Niagara v. Cordes*, 21 How. 7; *Blocker v. Whittenburg*, 12 La. Ann. 410; *Rogers v. Murray*, 3 Bosw. 357; *Houston R. v. Harn*, 44 Tex. 628; *The Maggie Hammond*, 9 Wall. 435; *Chouteaux v. Leech*, 18 Penn. St. 224; *Bird v. Cromwell*, 1 Mo. 81; 13 Mo. App. 415.

² *Notara v. Henderson*, L. R. 5 Q. B. 346; s. c. L. R. 7 Q. B. 225.

³ *Steamboat Lynx v. King*, 12 Mo. 272.

⁴ *Lemont v. Lord*, 52 Me. 365.

If, however, the carrier has once transshipped property under justifying circumstances, he is not bound to take it on board again after the immediate danger is passed.¹

A carrier delayed with his goods from some cause for which the law will excuse him should, when that cause ceases to operate, proceed onward and complete the transit, if the interests of the owners of the goods so require.² And his inexcusable failure to put the goods in transit at all, or his want of ordinary foresight in receiving goods which were not likely to go through safely unspoiled and uninjured, will charge a carrier with all the damaging consequences.³ As between perishable and non-perishable goods, or things animate and inanimate, the former might naturally claim some priority in the exercise of due care if delay occurs; but supposing the carrier to have prudently undertaken his business, he is not bound to transport one kind to the exclusion of the other, nor to show undue preference, but rather to do his duty fairly by all customers as the exigency may require.⁴ One's absolute contract as common carrier to receive and transport goods at a future time is not rightfully broken merely because some superhuman necessity intervenes to prevent a prompt performance; but this, at the utmost, can only suspend the progress of his journey.⁵ For mere delay, reasonable in the course of events, courts are not disposed to visit the carrier harshly nor to pronounce a delay unreasonable without reference to the circumstances.⁶

¹ *Cox v. Foscue*, 33 Ala. 713; *Branch v. Wilmington R.*, 77 N. C. 347. See *Wilson v. Harry*, 32 Penn. St. 270.

² *Lowe v. Moss*, 12 Ill. 477.

³ *Adams Express Co. v. McDonald*, 1 Bush, 32; *Clarke v. Needles*, 25 Penn. St. 338; *Tierney v. N. Y. Central R.*, 76 N. Y. 305; *Hewett v. Chicago R.*, 63 Iowa, 611.

⁴ *Dixon v. Chicago R.*, 64 Iowa, 531. But cf. *Tierney v. N. Y. Central R.*, *supra*.

⁵ *Collier v. Swinney*, 16 Mo. 484. See 2 Mo. App. 557; *Sumner v. Charlotte R.*, 78 N. C. 289.

⁶ *Post*, c. 6.

§ 405. **Legal Liability distinguished from Duty ; How far Carrier is answerable as an Insurer.** — So much, then, for those general duties of the common carrier to which his bailment undertaking naturally gives rise. Taking circumstances in their true relation to one another, this standard is ordinary care and diligence, as in other bailments for hire. The instances in which we are presently to trace their influence upon the mutual adjustment of losses will not want that filament which connects our whole system of bailments, namely, the legal requirement of good faith on the bailee's part, and the exercise of a certain degree of diligence towards the thing confided to him ; a consideration peculiarly applicable where the carrier's public liability has been reduced by special contract or legislation. And yet our present bailment is not an extraordinary one in the sense of requiring the exercise of an extraordinary degree of diligence and nothing beyond it. Public policy under the common law takes a higher plane ; and, without asking whether a certain loss or injury occasioned to property which was consigned for carriage to one who exercised a public vocation in conveying it imputes to him actual diligence or negligence, actual blame or blamelessness, pronounces him legally answerable therefor, unless he can clear himself by bringing the loss or injury within certain stated exceptions. It makes the common carrier, in other words, a virtual insurer against all risks of loss or injury save those (1) of loss or injury by act of God, and (2) of loss or injury by a public enemy ; to which modern precedent justifies us in adding, (3) of loss or injury by act of the owner or consignor of the goods, since common justice demands that the carrier's customer shall suffer for his own faults. One more exception this writer ventures to add, in advance of judicial announcement, viz., (4) of loss or injury by the public authority.¹

¹ This, like the other exceptions, will presently be discussed at length.

As regards the two former exceptions, our law has fastened upon these not simply for the reason that the cause of loss is irresistible, — for so, too, might be the scattering of the carrier's goods by a mob, or their destruction by an accidental fire, — but because calamities like these are matter of public notoriety, open to investigation, and such as no carrier would be likely to draw upon himself by corrupt collusion with individuals or fraud upon his customer. Here we may perceive, as in the case of innkeepers, the operation of a principle whereby the public bailee is invested with a responsibility which no degree of prudence or forethought on his part can wholly confine.

§ 406. **Reason for this Severe Rule of Public Policy.** — Distrust of an ancient profession whose members could, if they chose, easily embezzle or confederate with thieves, and might cover up losses occurring through heedlessness or misconduct on their part by artful pretexts whose falsehood the customer himself had little chance of exposing, will explain the stringency of the law in this respect. The community, even in an era of lawlessness, had to confide their property to persons of this pursuit, or else be shut out from mercantile intercourse; so the law took the public cause into its special keeping.

Thus does Lord Holt put the argument in Queen Anne's time, for charging the common carrier against all occasion of loss, except acts of God and of public enemies, though the force be never so great, or even though he were robbed by an irresistible multitude: "And this is a politic establishment, contrived by the policy of the law for the safety of all persons the necessity of whose affairs obliges them to trust these sorts of persons, that they may be safe in their ways of dealing; for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered.

And this is the reason the law is founded upon in that point.”¹ A later English judge of renown, Best, C. J., developed the same line of reasoning quite as forcibly. “When goods,” he says, “are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows or sends any servant with them to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier’s servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property the law has added to that responsibility of a carrier which immediately rises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only to be relieved by two things, both so well known to all the country, when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not, namely: the act of God and the king’s enemies.”² A vast number of other authorities serve to strengthen this position by their approval, without, however, adding much to the reason of the rule itself, which is, undoubtedly, the stronger for simplifying the main inquiry in cases of loss, and so checking litigation.³

¹ *Coggs v. Bernard*, 2 Ld. Raym. 909, 918. See § 335.

² *Riley v. Horne*, 5 Bing. 217, 220.

³ See Story Bailm §§ 490, 491; Angell Carriers, §§ 148-153; 2 Kent Com 602; Nelson, J., in *New Jersey Steam Nav. Co. v. Merchants’ Bank*, 6 How. 344; Hubbard, J., in *Thomas v. Boston R.*, 10 Met. 472, 476; Bronson, J., in *Hollister v. Nowlen*, 19 Wend. 234; Mershon v. Hobensack, 22 N. J. L. 372; Sergeant, J., in *Harrington v. M’Shane*, 2 Watts, 443; Klauber v. American Express Co., 21 Wis. 21. In *Hollister v. Nowlen*, *supra*, stress is laid upon the carrier’s right to graduate his charge according to the risk he runs, as proof that he suffers no great hardship under such a policy.

§ 407. **The same Subject.** — Under this ensign the courts of England and America have rallied for centuries; yet there is reason to believe that a conservative regard for ancient precedent, and a disposition to rest on the popular side of the controversy, have kept the carrier's responsibility wound up to this pitch, more than an unshaken conviction of the justice and necessity of the rule, whatever changes in society or in the modes of transportation time might bring. Consistency drove our courts to declaring ships at sea public carriers in this sense of public insurers;¹ but how slight the chance here of plunder by fraud or collusion when compared with that "poor carrier" who travelled by himself over lonely roads infested by marauders, and whose hard lot, should he, an honest fellow, happen to be robbed without any default whatever on his part, Lord Holt could not, out of his humanity, help pitying.² Modern business methods, modern inventions, modern customs, have all reduced the carrier's opportunities for clandestine plunder of his customers quite as low, it may be thought, as those of depositaries, commission merchants, and a host of others who were never put in this pillory of public policy. The carriage of property is now organized on an immense scale, engaging numerous servants, conducted with much publicity, choosing often for managers men whose names ought to inspire confidence among their fellow-citizens, and who, at all events, would not be suspected of plundering the merchandise they conveyed. With the introduction of steam, and of traffic by railway more especially, we find the Anglo-Saxon rule put to a harder strain in the last fifty years than during all the preceding centuries of inland carriage put together. The distrustful feeling towards common carriers which modern experience engenders is not so much that of positive dishonesty on their part, as of overbearing and extortionate conduct and negligent and reckless transportation. Carriage monopolists are growing so

¹ *Supra*, § 338.

² See *Lane v. Cotton*, 12 Mod. 482.

rich, so powerful, and that responsibility which, to be conscientiously exerted, should be individual, is getting to be diffused through so many subordinates, that the small consignor is bruised, if not broken, when he seeks justice against the carrier, unless he can simplify his cause and the proof required. This the old rule certainly enables him to do, and hence he may hold the carrier to something like a scrupulous discharge of his duty; and, if the judgment be severe, feel at least assured that it is to be satisfied out of a large fund, without causing human misery. Except for some such need of an advantage to the pigmy who contends against a giant, and a certain dread, among the people, lest our ministers become our masters, it is likely that the old maxims would, ere this, have spent considerable of their pristine force.

§ 408. **Modern Rule affected by Legislation, Special Contract, etc.**—We shall show, in the succeeding chapter, that, with more particular reference to modern railways, steamships, and sailing-vessels, the ancient rigor of the carrier law has much abated; not only that legislation in England and America strikes out some of the most hazardous risks the common carrier was once compelled to run, but that by virtue of special contract with his customers, and this often of the most indirect character, the carrier has been permitted to gain a very considerable advance towards immunity, and, indeed, at some periods of our law, almost a complete immunity.¹ No view of the carrier's practical relation with his patrons in modern days can be thought complete which fails to take in all of these possible modifications of liability. Yet the ancient doctrine which Lord Holt and his predecessors inculcated is at the basis of our carrier jurisprudence, and this we must accordingly make the starting-point of the present investigation.

§ 409. **Influence of Modern Insurance as a Special Pursuit.**—The development of insurance, in modern times, as a dis-

¹ See next chapter, where this subject is treated at length.

inct and special business pursuit tends, we may add, to favor a modern discrimination between the charge for diligent carriage and that for incurring hazards beyond this; the effect being that a professed carrier shall reap the legitimate reward of his proper service, while an insurance company takes premiums for the risks which ordinary care cannot forestall. But, notwithstanding a shipper takes out insurance on the goods which he gets transported, the common carrier, under the common-law doctrine, runs his usual risk besides; and should a loss occur, for which both carrier and insurer would be legally answerable, the shipper has the right to treat the carrier as primarily liable, and sue him for the insurer's benefit.¹

§ 410. **First Exception; Loss or Injury by Act of God.**—Now, in detail, as to the exceptional cases which the common law always recognizes, where the carrier's risk is under consideration.

1. Loss or injury by act of God. A loss by "act of God" signifies such irresistible disaster as results immediately from natural causes, and is in no sense attributable to human agency.² The civil law employs, as a corresponding term, *vis major*. With less point the phrases *casus fortuitus* and "inevitable accident" are sometimes used as expressive of the same idea.³ The latter phrase Sir William Jones desired to substitute for the somewhat irreverent one the fathers of English law had put in circulation.⁴ But, as Lord Mansfield has shown, "inevitable accident" is by no means synonymous with "act of God;" for an accident due to human force or fraud might be pronounced inevitable, while the act of God, on the contrary, means something which is opposed to the act of man.⁵

¹ *Burnside v. Union Steamboat Co.*, 10 Rich. 113.

² *Story Bailm.* §§ 25, 511; 2 *Redfield Railways*, § 151; *Angell Carriers*, §§ 154, 155; *U. S. Digest*, 1st Series, *Carriers*, 122, 123.

³ *3 Kent Com.* 217; *Angell Carriers*, § 155.

⁴ *Jones Bailm.* 101, 105.

⁵ *Forward v. Pittard*, 1 T. R. 27, 33; *Trent Nav. Co. v. Wood*, 4 Doug. 280. And see *Wright, J.*, in *Merritt v. Earle*, 29 N. Y. 115.

The current of the decisions serves to confirm the strict, if not precisely literal, construction put upon this term by our earlier jurists; a term which indicates that which man neither produces nor can contend against, a natural necessity, as the carrier's sole ground of justification under the present head, and not merely some calamity which human intervention so brought about that the carrier was unable to escape it, and which human instrumentality might have altogether prevented. Accidents attributable, while the carrier pursues his line of duty, to lightning, tempest, earthquake, flood, and sudden death, afford the usual instances of disaster which the common law recognizes as the "act of God."¹

Damage caused by rain, stress of bad weather, snow, freezing, thawing, rough winds, and the like, are also referable to this head.² But, since the less sudden and violent action of the elements may better be foreseen by prudent men, and guarded against, or, at all events, kept from doing their worst, the carrier is here less readily excused than before. A snow-storm blocking up the railroad track may excuse delay, or, under strong circumstances, loss or injury, by a carrier;³ and so, too, may the freezing of a canal or river.⁴ And if the owner of goods which are liable to be injured by freezing or melting chooses to send them at a season of the year when the carrier cannot, by exercising due care, prevent

¹ See Story Bailm. § 511; Angell Carriers, §§ 154, 155; U. S. Digest, 1st Series, Carriers, 122, 123; *Forward v. Pittard*, 1 T. R. 27; *Nugent v. Smith*, 1 C. P. D. 19, 423; *Railroad Co. v. Reeves*, 10 Wall. 176; *Michaels v. New York R.*, 30 N. Y. 564; *McHenry v. Railroad Co.*, 4 Harring. 448, 449; *McArthur v. Sears*, 21 Wend. 190; *Denny v. New York Central R.*, 13 Gray. 481; *Morrison v. Davis*, 20 Penn. St. 171; *Powell v. Mills*, 30 Miss. 231; *Nashville R. v. David*, 6 Heisk. 261.

² Story Bailm. § 511; Angell Carriers, §§ 160-165; *Empire Trans. Co. v. Wallace*, 68 Penn. St. 302.

³ *Ballentine v. North Missouri R.*, 40 Mo. 491; *Vail v. Pacific R.*, 63 Mo. 230.

⁴ *Parsons v. Hardy*, 14 Wend. 215; *Amies v. Stevens*, 1 Str. 128; *Bowman v. Teall*, 23 Wend. 306; *Harris v. Rand*, 4 N. H. 259.

their exposure to the mischief in question, he may be said to take such risk upon himself.¹ Even a sudden failure of wind may, like a sudden gust, be deemed an act of God.²

§ 411. **The same Subject; Loss by Fire or Explosion.**— But losses by fire are, generally speaking, not to be excused as the “act of God.” To have to insure against this risk is, perhaps, the harshest infliction which our common carrier must bear; yet to their rule in this respect the courts have firmly adhered. The ground taken appears to be that a fire, whatever may have caused its spread, and however far it may have outrun the control of those who started the first spark, originates in human agency, and not independently of it. Hence the common carrier, by land or water, though free from all complicity in the disaster, energetic in repelling the flames, vigilant and prompt in the moment of danger, must answer for his customer’s goods so injured or destroyed. For, as against fires, accidental or otherwise, he is pronounced an insurer;³ not, however, by way of logical exception, where the cause of the fire was a lightning stroke, for this would be an “act of God;” nor, as it appears, when the case is purely one of spontaneous combustion.⁴

¹ See Chapman, J., in *Swetland v. Boston & Albany R.*, 102 Mass. 276, 283.

² *Colt v. M'Mechen*, 6 Johns. 160. But as elsewhere, the case should be free from negligence on the carrier’s part, or other human agency, as the proximate cause of the disaster. See Wallace’s criticism of this decision, 1 Smith Lead. Cas. 233, Am. ed.; Angell Carriers, § 155. And see § 431, *post*.

³ *Forward v. Pittard*, 1 T. R. 27; *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Gatliffe v. Bourne*, 4 Bing. N. C. 314; *Morewood v. Pollok*, 1 El. & Bl. 743; *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539; *Parker v. Flagg*, 26 Me. 181; *Moore v. Michigan R.*, 3 Mich. 23; *Cox v. Peterson*, 30 Ala. 608; *Singleton v. Hilliard*, 1 Strobb. 203; *Graff v. Bloomer*, 9 Penn. St. 114; *Gilmore v. Carman*, 1 Sm. & Marsh. 279; *Chevallier v. Straham*, 2 Tex. 115.

⁴ See Angell Carriers, §§ 156–159; Story Bailm. § 511. But see acts limiting the responsibility of ship-owners, *post*, c. 5. So imperiously does the common law compel submission in this respect that the New York

As in the case of fire, loss from the explosion of a steam boiler is inexcusable; for this originates in human and not divine agency, so that the carrier is here afforded no claim of exemption from the risk of insurer.¹

§ 412. **The same Subject; Effect of a Sudden Strike or Impressment.**—A sudden combination and strike of engineers on a railway, or of a carrier's other skilled employés, essential to the transportation service, whose places cannot possibly be supplied at once by competent persons, may be an inevitable and unforeseen obstacle to the due performance of the carrier's duty; but he cannot so discharge himself as though this were in any sense an act of God or excepted calamity.² The same may be said of the sudden impressment into the navy of certain seamen who are needed on board ship to manage the carrier vessel to which they properly belong.³

Court of Appeals once refused to excuse a common carrier, where it appeared in evidence that a sudden gust of wind diverted the course of a distant fire so as to drive the flames unexpectedly upon the goods in his charge and destroy them. *Miller v. Steam Nav. Co.*, 6 Seld. 431. The court did not, as it would appear, controvert the position taken in defence, that, where the proximate cause of destruction is the "act of God," as, for instance, a sudden gust of wind, and not fire, the carrier is exonerated, but rested their decision on his general liability to respond for the accidental destruction of property on the transit by a fire whose origin is presumably in some act of man. But quite recently, on a sharper issue of facts, the Supreme Court of Pennsylvania protected the carrier on precisely this distinction between the proximate and remote cause of fire. A fire in distant woods, doubtless of human origin, had been raging some days; when a sudden tornado of remarkable force sprang up, and drove the flames with such force into the town that it was, in about two hours, destroyed, inclusive of the carrier's freight cars and their contents, the cars being switched off to await, as usual, a fresh locomotive. Here it was ruled that the tornado, an "act of God," and not the accidental fire, was the proximate cause of loss, and hence that the carrier need not respond for the destruction in damages, no negligence on his part appearing. *Pennsylvania R. v. Fries* (1878), 87 Penn. St. 234.

¹ *The Barque Edwin*, 24 How. 386; 1 Cliff. 322; 1 Sprague, 477; *McCall v. Brock*, 5 Strobb. 119; *The Mohawk*, 8 Wall. 153.

² *Blackstock v. New York & Erie R.*, 1 Bosw. 77; 20 N. Y. 48.

³ *McArthur v. Sears*, 21 Wend. 190, 199, per Cowen, J. But see

§ 413. **The same Subject; Hidden Obstructions, etc., through Natural or Human Agency.**—The striking of his vessel upon some hidden and unknown rock, snag, shallow, or bar has, in several instances, been deemed an act of God, for which the carrier is not legally answerable.¹ A sudden and recent formation of sand, too, in a place where vessels were wont to sail in safety, may afford a similar cause of exemption.² All the stronger must be the case where storm, flood, tempest, or other natural necessity drives the vessel thither, or suddenly produces the obstruction. But here the causation of the disaster should be keenly scrutinized, lest human agency appear uppermost, either on the part of a stranger, in placing the obstacle there, or in respect of the carrier himself, in carelessly failing to keep clear of it. The agency which produces such disaster should be essentially a natural one. If the existence of the rock, bar, shoal, or snag was generally known to navigators, and prudent mariners knew how to avoid it, the carrier cannot, by striking upon it without compulsion of the elements, be said to have suffered an irresistible disaster from natural cause; for his own carelessness produces it. And hence, in rivers and harbors whose formation is reduced to chart, nothing can be called, so as to excuse a carrier, hidden and unknown, in the legal sense here considered, which good pilots are wont to avoid.³

On the other hand, the sinking of an anchor, a mast, a cable, a boat, a cargo, or other similar obstruction, is certainly

Hodgson v. Malcolm, 5 B. & P. 336; § 428, *post*, as to loss by direct act of public authority.

That mere delay resulting from such a misfortune should be leniently treated, see *supra*, § 404; *post*, c. 6.

¹ *Williams v. Grant*, 1 Conn. 487; *Smyrl v. Niolon*, 2 Bailey, 421; *Story Bailm.* §§ 516, 517; *Steele v. McTyer*, 31 Ala. 667.

² *Ib.* But see *Friend v. Woods*, 6 Gratt. 189, which disinclines to relax so much the carrier's liability as insurer.

³ See *Collier v. Valentine*, 11 Mo. 299; *Friend v. Woods*, 6 Gratt. 189; *Pennewill v. Cullen*, 5 Harring. 238.

due presumptively to human, and not divine intervention; and, according to the best authorities, even though a carrier show that his loss occurred by running without fault upon something of this character hidden in the water, he shall not on this account be legally excused from the consequences to his freight.¹ Thus, in New York, an accident to a steamboat, caused immediately by its contact with the mast of a sloop which had been sunk in a squall two days before, has been held not to absolve the owners of the steamboat from their liability for freight as public carriers.² And in New Jersey a similar decision was rendered where a carrier's barge, during an unusually low tide after a storm, was pierced by a timber projecting from a wharf, which, in ordinary tides, could not have done such a mischief.³

§ 414. **The same Subject; Accidents in Transportation, Collision, etc.** — Accidents in navigation, which one may attribute to a display of false lights, the drifting of a buoy, or the removal of a beacon, are not devoid of human agency, though the navigator and carrier himself were blameless.⁴ Nor, to lay down a broad principle, is any loss on which a carrier might found his own action for damages, because of another

¹ *Trent Nav. Co. v. Wood*, 3 Esp. 127; *Smith v. Shepherd*, cited Abbott Shipping, 11th ed., pt. 4, c. 6, § 1; *McArthur v. Sears*, 21 Wend. 190; *Merritt v. Earle*, 29 N. Y. 115.

² *Merritt v. Earle*, 29 N. Y. 115, 121. Here it was said that there was no "act of God," as concerned the carrier; and that the squall which sunk the sloop was not the immediate proximate cause of this accident, though it might have been that of sinking the sloop. The evidence showed, however, as going still further to subject the carrier to the usual liabilities, that the sunken mast was out of water fifteen or sixteen feet, at low tide, for two days before the steamboat struck, and hence could not have literally been a "hidden obstruction." Cf. *Redpath v. Vaughan*, 52 Barb. 489.

³ *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. L. 697. In this case it was held that, admitting the storm to be the remote cause of loss, the proximate cause was the projecting timber.

⁴ *McArthur v. Sears*, 21 Wend. 190; *Reaves v. Waterman*, 2 Speer, 197; *Angell Carriers*, §§ 197-199.

party's wrong, fitly pronounced to be an "act of God." A collision of vessels, therefore, not brought on immediately by tempest or other natural accident, ought, upon good reasoning, to be taken as insufficient reason of exemption for a carrier to allege under the present head, notwithstanding his own vessel was blameless.¹ And the same may be affirmed of trains which collide on a railway track, or stages which run into one another, if they belong to different carriers.

§ 415. **The same Subject; Destruction by Animate Nature; Rats, etc.** — Whether the action of animate nature to the injury of goods may ever excuse a carrier is not clearly stated by authority. Such agency may not be human, but to attribute it to natural necessity and bring it within our exception is another matter. Thus the destruction of one's goods by rats or other common vermin is no "act of God," and is held not to excuse the carrier even though he be so prudent as to keep a cat about the vehicle.² Nor can the carrier set up as an excuse that worms destroyed his ship's bottom in the course of the voyage; since every vessel in actual service is expected to be seaworthy.³ If the carrier were careless, the surer must be his condemnation.

¹ *Plaisted v. Boston Steam Nav. Co.*, 26 Me. 132; *Mershon v. Hobensack*, 2 Zab. 372.

But whether collisions may not come within such special contract exceptions as "perils of the sea," or "dangers of navigation," see *Story Bailm.* §§ 512, 514; *Smith v. Scott*, 4 Taunt. 126, and other cases, *post*.

² *Dale v. Hall*, 1 Wils. 281; *Laveroni v. Drury*, 8 Ex. 166; *Kay v. Wheeler*, L. R. 2 C. P. 302. Cf. *Story Bailm.* § 513; *Angell Carriers*, § 169.

³ *Forward v. Pittard*, 1 T. R. 27; *Backhouse v. Sneed*, 1 Murph. 173; *Story Bailm.* §§ 509, 513; *Hazard v. New England Ins. Co.*, 8 Pet. 557; *Kopitoff v. Wilson*, 1 Q. B. D. 377; *The Northern Belle*, 9 Wall. 526; *supra*, § 402. It appears to this writer that unforeseen injury caused by animate nature might in some extreme case excuse a carrier who had not been wanting in prudence and foresight; as, for instance, should a swarm of locusts or vermin suddenly appear from some unknown quarter. Perhaps it might be said, however (not to put too fine a point to it), that some inanimate natural agency bred the calamity.

§ 416. **The same Subject; Natural Decay, Waste, Wear and Tear, etc.** — But losses due to the natural decay, deterioration, and waste of the things carried are excusable; and such, also, as may be fairly attributed to the ordinary wear and tear of the journey; all this, however, with reference to the nature and inherent qualities of the articles in question, their unavoidable exposure at the time and place and under the general circumstances, while in charge of a carrier of ordinary prudence, and the condition in which the shipper may have chosen to intrust them to the carrier for the particular transportation.¹ For example, where liquids evaporate, effervesce, sour, or burst the bottles, or leak out of the casks in which they were consigned (for whose imperfections the carrier is no more answerable than for their own inherent qualities), the loss is not the carrier's, unless he occasioned it by remissness of duty.² Nor, where meat taints, lard melts, oranges and lemons rot, salt loses its savor, or eggs grow stale, is the carrier necessarily under obligation to replace the goods in quantity or quality, or stand to the loss in damages.³ The broad ground of all such exemption is "act of God;" or, in other words, that natural causes must be allowed their natural and inevitable operation during the accomplishment of the bailment purpose, provided the bailee pursue his course with ordinary care and diligence. This doctrine may often be found reinforced by that other reason of exoneration to be later discussed, the fault of the owner or customer himself. For the common-sense of carriage undertakings forbids that the carrier should warrant, by implication, the quality of what he simply conveys

¹ Story Bailm. § 492 *a*.

² *Hudson v. Baxendale*, 2 H. & N. 575; *Warden v. Greer*, 6 Watts, 424; *Powell v. Mills*, 37 Miss. 691.

³ Story Bailm. § 492; *Ship Howard v. Wissman*, 18 How. 231; *Swetland v. Boston & Albany R.*, 102 Mass. 276; *Nelson v. Woodruff*, 1 Black, 156; *Lawrence v. Denbreens*, 1 Black, 170; *Brown v. Clayton*, 12 Ga. 566; *Clark v. Barnwell*, 12 How. 272. *Aliter*, as noted *post*, where the loss was through fault of the carrier.

for the true owner, be things better or worse, and more or less capable of bearing the exposure of the journey.

We shall hereafter discover these same principles qualifying the liability of one who transports animals, so that he need not be a life and health insurer of such creatures.¹

§ 417. **The same Subject ; Jettison.**—Whether jettison by a carrier will render him liable for the loss so occasioned depends upon circumstances. In an ancient case, goods were thrown overboard, during a sudden storm, by a bargeman who carried passengers and these goods together ; this was done prudently to lighten the boat and save human lives ; and it was resolved by Lord Coke and his associates that the bargeman should be exonerated from the loss, inasmuch as the sudden storm or act of God was the direct occasion of his loss.² Under other justifying circumstances jettison may be ascribed to act of God.³ But where the jettison springs out of no such divine necessity, but is resorted to under circumstances of human compulsion, or because of some strait into which the carrier's imprudence has brought him, or carelessly or wantonly, the carrier should be made to suffer for it.⁴

§ 418. **Second Exception, Loss or Injury by Public Enemies.**—2. Loss or injury by public enemies. "Public enemies," in this connection, are those with whom the government which prescribes these conditions of carriage contract is at open war. This is what the expression, more familiar in the

¹ *Post*, §§ 442–444, as to animals ; *Story Bailm.* § 576.

² See Lord Coke, in *Bird v. Astcock*, 2 Bulst. 280. And see *Gillett v. Ellis*, 11 Ill. 579 ; *Johnston v. Crane*, 1 Kerr (N. B.), 356 ; *Story Bailm.* § 525.

³ *Price v. Hartshorn*, 44 N. Y. 94.

⁴ *The Portsmouth*, 9 Wall. 682 ; *Barcroft's Case*, cited Aleyn, 93, and commented on in *Jones Bailm.* 107, 108, and *Story Bailm.* § 531. See Mr. Justice Curtis in *Lawrence v. Minturn*, 17 How. 100 ; Mr. Justice Clifford in *The Delaware*, 14 Wall. 579.

See also § 431, *post*, as to the proper stowage of goods, where the subject of loss by a carrier's own fault is further considered.

mother country, of "king's enemies," or "queen's enemies," properly signifies; for it would be absurd to confine this common-law exemption of the carrier to the enemies of a kingdom or monarchy.¹

Under our American system, State and Federal sovereignty may come into conflict; and yet the Constitution plainly gives the supremacy as to declaring and dealing with public enemies to the United States, or the Federal head. With abundant reason, therefore, the Confederate insurgents of 1861, with whom the Union waged open war, have been styled "public enemies," thus affording to our carriers a rule of practical immunity in certain cases which simple justice demanded, rather than for affixing upon particular States or their inhabitants a needless stigma.² Hostile tribes of Indians, too, on our borders, may well be regarded as "public enemies," though their status with reference to the government is a peculiar one.³

§ 419. **The same Subject; Acts of Mobs, Rioters, etc.** — But, as a rule, the violence of mobs, rioters, and insurgents within a sovereign jurisdiction does not constitute a cause of exemption within the meaning of the term "public enemies."⁴ This

¹ *Russell v. Niemann*, 17 C. B. N. S. 162. See *Story Bailm.* § 526; *Angell Carriers.* § 200; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Holladay v. Kennard*, 12 Wall. 254; *Gage v. Tirrell*, 9 Allen, 299.

² *McCranie v. Wood*, 24 La. Ann. 406; *Bland v. Adams Express Co.*, 1 Duv. 232; *Lewis v. Ludwick*, 6 Coldw. 368; *Philadelphia R. v. Harper*, 29 Md. 330; *Holladay v. Kennard*, 12 Wall. 254; *Nashville R. v. Estes*, 10 Lea, 749; *Caldwell v. Southern Express Co.*, 1 Flip. 85. Cf. *Porcher v. Northeastern R.*, 14 Rich. 181.

³ *Holladay v. Kennard*, 12 Wall. 254. This applies, we presume, only to Indians maintaining their peculiar tribal relations, not taxed, and virtually excluded from citizenship under our constitution. See U. S. Constitution, art. 1, §§ 2, 3, 8.

⁴ *Story Bailm.* § 526; *Coggs v. Bernard*, 2 Ld. Raym. 909; *Barclay v. Heygena*, cited by Lord Mansfield, 1 T. R. 27; *S. C. nom. Barclay v. Cuculla y Gana*, 3 Doug. 389. "For though the force be never so great," says Lord Holt, "as if an irresistible multitude should rob him, nevertheless he is chargeable." *Coggs v. Bernard*, 2 Ld. Raym. 909, 918.

is a great hardship imposed by our law upon the carrier, and second only to that of his liability for a loss by accidental fire.¹ And it is well understood that the common carrier can claim no legal immunity from the depredation of thieves and robbers, but is held as an insurer against all losses of this character, even though he were personally free from the reproach of complicity or cowardice.

§ 420. **The same Subject; Pirates; Privateers.**—It has been claimed that acts of pirates fall within our present exception; inasmuch as pirates are now pursued by civilized nations, and scourged as the common enemies of mankind.² So, with equal or better reason, should acts of privateers furnish the carrier with a cause of exemption; for if privateers differ at all from pirates,³ it is only because the broad seal of a belligerent power sanctions their depredations, so as to exalt those by whom the carrier is thus overpowered all the more nearly to the plane of “public enemies.”⁴

§ 421. **Third Exception; Loss or Injury by Act of the Customer.**—3. Loss or injury by act or fault of the consignor of the goods, or the customer himself. This third case of exemption appears not to have been specially stated in the earlier books; but the influence of the consignor’s or customer’s conduct in diminishing or excluding his right of recovery under the contract, has always been conceded; and in many of the latest decisions, this class of exceptions will be found expressly recognized.⁵ Whenever the consignor or customer has, under a contract of carriage, by himself or his servants, wilfully, fraudulently, or in negligent disregard of his duty as bailor, occasioned the loss complained of, the carrier may set this up for his own especial justification.

¹ *Supra*, § 411.

² Story Bailm. §§ 25, 526.

³ See *The Magellan Pirates*, 25 E. L. & Eq. 595.

⁴ 1 Kent Com. 96.

⁵ See U. S. Digest, 1st Series, Carriers, 123; *Choate v. Crowninshield*, 3 Cliff. 184.

§ 422. **The same Subject; Packing, Loading, Selection of Place, etc., by Customer.** — Thus, if there be some hidden defect in the packing, whence damage ensues, this (if not excusable as “act of God,”¹) is the act of the owner or consignor, and the carrier stands absolved.² Or, if the goods are improperly marked, or directed, the carrier cannot be blamed for their being missent accordingly, in fair pursuance of direction.³ The duty of loading and stowing, as we have seen, devolves commonly upon the carrier;⁴ and yet if heavy machinery or other peculiar freight, which the shipper, according to custom, secures on board by his own experts specially selected for the service, should give way on the transit because of their carelessness, the carrier might, on this plea, escape liability.⁵ And as to packing, loading, and securing the property on the vehicle generally, it may often be material to inquire how far the performance, instead of being intrusted to the carrier and his own servants, or where at all events the carrier had the responsible supervision, was kept under the exclusive management and control of the consignor or customer himself; since presumptions of duty may be controlled by the actual circumstances of a case.⁶

Where again, contrary to usage, the owner or shipper makes special choice of the vehicle, or of a particular part of it, under circumstances charging him with full knowledge

¹ *Supra*, § 416.

² Lord Denman, in *Middle v. Stride*, 9 C. & P. 380; *Klauber v. American Express Co.*, 21 Wis. 21. As, for instance, where rags were delivered to the carrier, damp and badly packed, and without notice that special care was needful on the carrier's part. *Baldwin v. London R.*, 9 Q. B. D. 582.

³ *Congar v. Chicago R.*, 24 Wis. 157; *Stimson v. Jackson*, 58 N. H. 138.

⁴ *Supra*, § 393.

⁵ *Ross v. Troy & Boston R.*, 49 Vt. 364. Cases like these should be deemed exceptional, however; for usually, in loading, the shipper's agents are taken to be the agents of the carrier, who should satisfy himself that the goods are securely placed.

⁶ Cf. *supra*, § 393, and *post*, § 443.

of its capabilities and defects — and especially if he agree to pay lower rates for inferior accommodations — the carrier might not be held absolutely responsible for injuries solely attributable to such understood defects; as in the owner's selection of a cattle-car with projections which must needs bruise the cattle,¹ or of some place in a ship for perishable commodities, where the means for ventilation are not the best.² For, it may be argued, if the carrier makes the actual disadvantages plain, pointing out to his customer such defects as are not palpable and visible, he shifts so much of the risk of carriage upon the other party as under some special contract. This, however, is a dangerous theory to press far; and we cannot safely assume that a carrier is left thus at liberty to use vehicles not reasonably fit for their purpose, nor to divest himself of the duty of exercising at least ordinary diligence and care as to the thing transported throughout the full period of his public relation towards it.³

§ 423. **The same Subject; Customer's Bad Faith; Deception as to Contents.** — Bad faith, too, wherever exhibited, dulls the sympathy of the law towards the victim who has practised it to his own injury. And since a carrier may not break packages, and learn for himself what they contain or how much they are worth, nor ply the consignor with searching interrogatories, the latter party should take heed that appearances and his own voluntary statements be not calculated to deceive and impose upon the carrier.⁴ One who sends goods need not, to be sure, disclose their value in general, unless asked;⁵ but for the purpose of regulating the

¹ *Harris v. Northern Indiana R.*, 20 N. Y. 232.

² *Ib.* We shall presently see that the stowage of goods on deck with the shipper's assent may expose them to peculiar risks of loss which the shipper was not bound to take.

³ See *Railroad Co. v. Pratt*, 22 Wall. 123; *Pratt v. Ogdensburg R.*, 102 Mass. 557.

⁴ *Supra*, §§ 397–399, as to the consignor's duties.

⁵ *Walker v. Jackson*, 10 M. & W. 168; *Story Bailm.* §§ 565, 567;

carriage rates, and charging for the extra hazards incurred, the carrier may always ask the value of a package tendered him: in which case the sender should answer truly, since the carrier has the right to rely upon his response, unless he perceives it to be false, and to limit the amount of risk accordingly.¹ And while the sender is not bound to tell either the value of the goods or what his package actually contains, except, perhaps, in special cases, where the thing has a suspicious appearance, or great mischief may ensue from his silence, every statement made should be truthful, and not calculated to throw the carrier off his guard;² nor ought the sender, by device or artifice, to put off inquiry, so as to expose the carrier to undue responsibility.³ And, apart from open statements, should the consignor do up his package artfully, so as to make it appear less valuable or less liable to receive or inflict injury than is really the fact; or, by false marks or other trick, impose upon his bailee; all evil consequences which such misconduct may have invited must be borne by himself.⁴ For a carrier is to be charged with no responsibility beyond what the thing appears, on its face and the proof at command, to deserve; and the sender whose conduct induces him to relax his guard, or goes to deprive him of his just compensation, puts himself without the pale of justice.

Angell Carriers, § 264; *Orange County Bank v. Brown*, 9 Wend. 115; *Merchants' Despatch Co. v. Bolles*, 80 Ill. 473; *Phillips v. Earle*, 8 Pick. 182.

¹ *Phillips v. Earle*, 8 Pick. 182; *Little v. Boston & Maine R.*, 66 Me. 239. And see *Kenrig v. Eggleston*, Aleyn, 93; *Tyly v. Morrice*, Carth. 485, commented on by Lord Mansfield, in *Gibbon v. Paynton*, 4 Burr. 2298.

² *Crouch v. London R.*, 14 C. B. 255; *Nitro-Glycerine Case*, 15 Wall. 521; *American Express Co. v. Perkins*, 42 Ill. 458.

³ *Railroad Co. v. Fraloff*, 10 Otto, 24.

⁴ *Gibbon v. Paynton*, 4 Burr. 2298; *Richards v. Westcott*, 2 Bosw. 589; *Southern Express Co. v. Everett*, 46 Ga. 303; *Warner v. Western Trans. Co.*, 5 Rob. (N. Y.) 490; *Relf v. Rapp*, 3 W. & S. 21; *Hutchinson v. Guion*, 5 C. B. n. s. 149; *Coxe v. Heisley*, 19 Penn. St. 243; *Chicago R. v. Thompson*, 19 Ill. 578. And see *Hayes v. Wells*, 23 Cal. 185.

§ 424. **The same Subject; Negligent Omission to state Contents.** — Apart from any wilful misconduct, the consignor may, by his negligent omission of duty, exonerate the carrier. Thus, where he fails to warn the carrier of the dangerous, fragile, or perishable nature of articles he delivers, whose peculiar character does not appear on inspection, he puts in jeopardy his right to recover for a loss which his ordinary prudence in this respect might have prevented.¹ He may even render himself personally liable in damages for injury of person or property occasioned the carrier, the carrier's servants, or, indeed, strangers, by things which were unsuitable for ordinary stowage, and more especially such highly dangerous articles as oil of vitriol, gunpowder, and nitro-glycerine, where he has been so indiscreet as to consign them, without especial warning, in packages whose exterior gives no indication of their true contents.² Where, too, things break, spoil, or run out, because of inherent defects or properties against whose mischievous operation unusual pains should be taken, the carrier may set up, in extension of the defence of natural wear and deterioration usually allowed him,³ that the damage was occasioned by the shipper in delivering the property without affording him the means of knowing its real nature or condition. For, if the carrier takes such reasonable pains against wasting, breaking, or spoiling, as the thing, when

¹ *Supra*, § 397; *Brass v. Maitland*, 6 E. & B. 470; *Farrant v. Barnes*, 11 C. B. N. S. 553; *Nitro-Glycerine Case*, 15 Wall. 524; *Boston & Albany R. v. Shanly*, 107 Mass. 568. See also *Pierce v. Winsor*, 2 Sprague, 35.

² *Ib.* Sprague, J, in *Pierce v. Winsor*, 2 Sprague, 35, commends the principle as a sound one, regardless of the shipper's innocence or ignorance of the danger. "It throws the loss," he says, "upon the party who generally has the best means of informing himself as to the character of the article shipped. A different rule might encourage negligence on the part of the shipper, and even induce him to try experiments with articles unknown to commerce, if he could set up his ignorance of the real character of the articles as a defence to any damage caused by the shipment."

³ *Supra*, §§ 397, 416.

accepted, appears to require, in accordance with its evident nature and condition, this is pains enough; though as to matters open, and not latent, he is bound to be alert and discriminating.¹

§ 425. **The same Subject; Mixed Custody in the Transit.** — Negligence or misconduct of the owner or customer during the transit itself may so far have occasioned the loss of the thing as to enable the carrier to set up the customer's act in defence. Two striking instances, presently to be dwelt upon, are afforded in the passenger who travels with his hand-baggage, and the drover who accompanies his cattle in a freight train;² while the driver of a carriage on a ferry-boat supplies a third illustration.³ In all such cases there is a mixed custody, so to speak, and liability for loss may actually rest upon carrier or customer, according to the circumstances.

§ 426. **The same Subject; Customer's Act must have primarily occasioned the Loss.** — But in order that the consignor's or customer's act or conduct may avail the carrier to excuse a loss, the act or conduct in question must have primarily and essentially occasioned or contributed to the loss; and, further, the carrier should not appear misbehaving, or failing in ordinary diligence on his part to ward off and escape the loss or injury. Where articles of unduly great value are concealed in the same box with ordinary merchandise, whose transportation is for hire, the carrier is not presumably divested of liability for the less valuable freight, while the more valuable remains unharmed.⁴ The fact that the consignor improperly marks the package does not excuse carelessness in its transportation;⁵ and though goods were badly packed, he cannot be

¹ *Ib.*

² See *post*, Part VII. c. 4, as to Liability for Baggage; and as to Drover, *post*, § 443.

³ See §§ 395, 445.

⁴ *Hyde v. New York Steamship Co.*, 17 La. Ann. 29.

⁵ *Union Express Co. v. Graham*, 26 Ohio St. 595.

answerable for injuries to which the bad packing did not contribute.¹ Nor can a carrier justify his conversion of the property he transports, or wrongful or careless behavior, on any such plea as that the consignor had fraudulently understated its weight.²

§ 427. **The same Subject; Carrier's own Vigilance should not relax.**—The judicial inclination appears to be, furthermore, against accepting the carrier's plea of the consignor's or customer's act in any such sense as would suffer his own vigilance and discretion to relax. Not even a fraudulent misstatement by the customer can be set up in defence, unless it relates to matters latent, and not open to his own observation; for the carrier must still exercise his own judgment upon the whole proof afforded him, consistently with his permitted scope of investigation, which, of course, is narrow.³ If goods be brought him which appear of improper condition, unwholesome, dangerous, and the like, or unsuitably packed and secured, he should refuse to receive them thus, or else see, in the one case, that they are stowed with reference to their apparent condition, nature, and quality, and, in the other, made reasonably secure;⁴ nor should he suffer what he perceives, or has fair reason to think, will be likely to injure other goods to go too near them.⁵ Where, again, the shipper's bill of goods, which describes them as of one kind, while they are really of another, and hence properly subject to higher charges, is stamped by the carrier, "weight, value, and contents, unknown," the stamp admission forbids any assumption, on the carrier's behalf, that he relied upon such misdescription of the goods.⁶

¹ *Shriver v. Sioux City R.*, 24 Minn. 506.

² *Wiggin v. Boston & Albany R.*, 102 Mass. 201.

³ *New Jersey R. v. Pennsylvania R.*, 27 N. J. L. 100.

⁴ *The David & Caroline*, 5 Blatchf. 266; *Union Express Co. v. Graham*, 23 Ohio St. 595.

⁵ *The Schooner Reeside*, 2 Sumn. 567.

⁶ *Lebeau v. General Steam Nav. Co.*, L. R. 8 C. P. 88. Cf. *Clark v.*

Courts and juries hesitate, in fine, to transfer the risks of transportation from the carrier to his customer, on any suggestion that the latter has concealed or misrepresented to the former's prejudice, where such concealment or misrepresentation was through inadvertence, or because of a silence neither unnatural nor inexcusable, and where, too, it does not reach fundamentals; but their presumption is rather against the party pursuing his public vocation, who is not intended to enter at pleasure into contracts as one on equal terms, and who, under no circumstances, should be allowed, on trivial grounds, to shift to his patron's shoulders the extraordinary risks which the law compels him to bear by himself.¹

§ 428. **Fourth Exception; Loss or Injury by the Public Authority.**—4. Since loss by "public enemies" affords the instance of carriage exemption because of human intervention as contrasted with that occasioned by Divine or natural intervention, such as we denominate "act of God," according to the old statement of the rule (to which we have just added the act of the customer himself), we may here inquire what would be the effect of a seizure of the goods and dispossession by the domestic public authority, or the strong arm of the law; a further exception, by human intervention, if an exception at all. How far this condition of things may excuse the carrier is not clearly adjudicated. There is a class of cases which holds that a wrongful attachment or seizure by a sheriff or other officer of the courts cannot be set up to excuse a carrier, any more than that of a highway robber, since the officer who so transgresses is a trespasser, and the carrier may treat him accordingly, while at all events bound to fulfil his contract toward his customer;² and another class affirms

Barnwell, 12 How. 272. And see *Harmon v. New York & Erie R.*, 28 Barb. 323.

¹ *Ib.*

² *Edwards v. White Line Transit Co.*, 104 Mass. 159; *Kiff v. Old Colony R.*, 117 Mass. 591; *Faust v. South Carolina R.*, 8 S. C. 118.

the same true as concerns customs officers who make a tortious seizure.¹ But where goods are taken into the genuine custody of the law, and so taken that the carrier is, without default or connivance on his part, constrained by public authority from performing his contract duty, and more especially where he has a remedy neither against the government nor the public officer who makes the seizure, it seems that the overwhelming necessity ought, in justice, to be his sufficient justification for delay or non-delivery; and a third class of cases tends strongly to establish this.² In case of a seizure or legal compulsion because of the carrier's own fault, the carrier can, of course, claim no exemption from full responsibility to the party who employed him.³

Our conclusion, from these cases and the light of reason, is, that a fourth legal exception should be stated to the carrier's common-law liability: namely, where loss or injury is directly caused by the public authority. And hence, should the carrier's own government, by a direct act of sovereignty, such as embargo, seizure, or impressment, hinder or interrupt his transit or intercept the goods, this overpowering act would serve him as an excuse, whether the government acted by its civil or military officers, through the courts or the executive department.⁴ We here suppose the carrier himself to

¹ *Gosling v. Higgins*, 1 Camp. 451.

² See Mr. Justice Nelson, in *Stiles v. Davis*, 1 Black (U. S.), 101; *Ohio & Mississippi R. v. Yohe*, 51 Ind. 181, and cases cited. The carrier ought to notify his customer in such case. *Ib.*; *Bliven v. Hudson River R.*, 36 N. Y. 403. That the rightful owner obtained possession by or without legal process would of course justify the carrier.

³ *Gosling v. Higgins*, 1 Camp. 451; *Spencer v. Chodwick*, 10 Q. B. 516; *Howland v. Greenway*, 22 How. 491; *Elwell v. Skiddy*, 15 N. Y. Supr. Ct. 73. And see 28 Fed. R. 920.

⁴ That under such constraint a carrier need not accept private business, see *Phelps v. Illinois Central R.*, 94 Ill. 548. And see *Wells v. Maine S. S. Co.*, 4 Cliff. 228, where the carrier was exonerated from the loss of liquors in his custody, which were seized and destroyed under the Maine liquor act of 1871; having given due notice of the seizure to the owner. So, too, the carrier's exemption during our civil war, which

have acted in good faith and with ordinary prudence and discretion.

§ 429. **Carrier Liable for Negligence or Default of Servants.** — A common carrier is doubtless liable to his customer for the negligence or default of his own servants, and all whom he may have occasion to employ under him, in the fulfilment of the particular undertaking.¹ Thus, where the carrier engages a tow-boat to tow his vessel, or barges to take goods on board, and damage ensues through the negligence of those in charge of the tow-boat or barges, he may hold these responsible on their undertaking towards himself, while the owner of the goods should look to the carrier alone for indemnity.² Partners, too, may be liable for an injury, which one of them inflicts, as their common servant.³ The railroad company which an express employs to transport goods is the express company's servant *pro hac vice*.⁴ And those who load and unload, even to the customer himself or his agents, may thus become the carrier's own servants for the work which it is his duty to direct.⁵

But it is held that employes of a railroad company who have struck and severed their relation cease to be servants of the carrier in any such sense as to bind the company for their acts.⁶

one State court excuses as the act of a "public enemy," appears in another regarded as an act of public (or "confederate") authority. *Nashville R. v. Estes*, 10 Lea, 749. As to the impressment of sailors, see § 412.

¹ *Blackstock v. New York & Erie R.*, 1 Bosw. 77; *Angell Carriers*, § 192; *Story Bailm.* § 507; *Winter v. Pacific R.*, 41 Mo. 503.

² See *Merrick v. Brainard*, 38 Barb. 574, reversed, however, on another ground, on appeal. 34 N. Y. 208.

³ *Bostwick v. Champion*, 11 Wend. 571; *Mayall v. Boston & Maine R.*, 19 N. H. 122.

⁴ *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *supra*, § 351.

⁵ *Supra*, § 393. We shall see this same principle operating in the case of connecting carriers, *post*, c. 9.

⁶ *Geismer v. Lake Shore R.* 102 N. Y. 563; *Pittsburgh R. v. Hollowell*, 65 Ind. 188.

§ 430. **Fraud and Misconduct of Carrier or his Servants is Inexcusable.** — The fraud and misconduct of the carrier or his servants, which occasions a loss, forbids, of course, his exemption on any plea, whether it be “act of God” or other pretended excuse; as if his ship be wilfully scuttled, or run aground, or deserted, or set on fire, whereby the cargo sustains injury.¹

§ 431. **Proximate and Remote Cause always regarded, where Excuse is set up.** — In applying any and all of these excuses, the proximate and remote, the direct and indirect, cause of the loss or injury in question must always be regarded, as our discussion of the four exceptions has already suggested.

Thus, to take the most familiar exception, “act of God.” Manifestly all issues of the present character, discussed under this head, pivot upon proximate or immediate cause of the disaster as distinguished from what is remote. Hence, the carrier’s own conduct, as inducing or enhancing the loss, or otherwise, becomes an affair of great moment. If a ferryman, for instance, ventures out in a blinding storm, or the master of a ship crowds sail to meet a tempest, the disaster invited by thus daring the elements should not be ascribed to the elements themselves, but to the carrier’s folly.² Or supposing a wagoner tries unwisely to ford a creek at dusk, and his wheels stick fast, so that a sudden rise of the waters injures the goods in his charge, his carelessness may not improperly be reckoned the immediate cause of the loss.³ When, again, a carrier needlessly deviates from his true course and sustains an accident, while out of his bearings,

¹ Story Bailm. § 519 *a*; *Waters v. Merchants’ Ins. Co.*, 11 Pet. 213.

² Angell Carriers, § 165; *Cook v. Gourdin*, 2 Nott & McC. 19.

³ *Campbell v. Morse*, Harp. 468. And see Doct. & Stud. Dial. 2, c. 38. The carrier cannot ascribe to some natural obstruction the accident which is due to bad steering and ignorance of the usual charts. *Supra*, § 413. Nor excuse himself for goods needlessly abandoned in a wreck. 13 Mo. App. 415; *supra*, § 404.

the law holds that he must suffer, and not his customer.¹ Or where he leaves his loaded vessel or car insufficiently manned, and the emergency comes against which he should in prudence have provided, his neglect of the goods makes him the culprit.² Wherever, in short, by overloading, deviating, furnishing unsuitable vehicles, servants, or equipments, journeying at improper seasons or in unsafe places, carelessly directing his vehicle, or imprudently exposing the property contained therein, the carrier substantially occasions the loss or injury under discussion, the proximate cause of loss, no matter what tempest or other natural calamity may come upon him, is of man's intervention, and that man the carrier himself.³ The law refuses to accept his excuse in such cases because the essential cause of loss was his remissness in duty.⁴

On such consideration of cause and effect, a carrier will be held responsible for the freezing of perishable goods, like potatoes, through his failure to take due and reasonable care, under all the circumstances, to protect them against the weather.⁵ Also for injuries caused by the wetting of such goods as he might, by the usual precautions, have kept dry; for a carrier is bound to prudently shelter what requires such attention while it continues in his custody.⁶ Also for damage

¹ *Davis v. Garrett*, 6 Bing. 716; *Phillips v. Brigham*, 26 Ga. 617; *Hales v. London R.*, 4 B. & S. 66; *Powers v. Davenport*, 7 Blackf. 497. Cf. *The Schooner Sarah*, 2 Sprague, 31; *supra*, § 403.

² *The Schooner Sarah*, 2 Sprague, 31; *West v. Steamboat Berlin*, 3 Iowa, 532.

³ See *Siordet v. Hall*, 4 Bing. 607; *Boyle v. McLaughlin*, 4 Harr. & J. 291.

⁴ As to the carrier's duty in the transportation of property, see *supra*, §§ 402-404.

⁵ *Wing v. New York R.*, 1 Hilt. 235; *Hewett v. Chicago R.*, 63 Iowa, 611; *Tierney v. N. Y. Central R.*, 76 N. Y. 305. And see *Wolf v. American Express Co.*, 43 Mo. 421, where the rule was applied to the freezing of wine in casks. But see *Swetland v. Boston & Albany R.*, 102 Mass. 276; *Vail v. Pacific R.*, 63 Mo. 230.

⁶ *Klauber v. American Express Co.*, 21 Wis. 21; *Philleo v. Sanford*, 17 Tex. 227.

caused by disregarding the consignor's reasonable directions as to the manner and position of carriage; as where the carrier of a box marked, "Glass, with care, this side up," conveys it upside down.¹ Also for natural injury operating upon an unseaworthy vessel which would not have harmed a seaworthy one;² and in failing to exercise due care and discretion to preserve goods where calamity overtakes him.³

§ 432. **The same Subject.**—And, as with exposure to the unforeseen action of natural elements, so in general as to permitting their normal operation and the wear and tear of the transit, no carrier can escape liability for loss and damage, who, from a failure to exercise such care and skill as is usually bestowed by prudent persons of his calling, becomes in any instance the efficient cause or occasion thereof. Thus, for badly stowing things in his wagon, car, or ship, so as culpably to leave them perilously exposed, there can be no excuse;⁴ nor can leakage be charged off against the owner, by way of common-law exemption, when the carrier himself has tampered with the cask;⁵ nor natural waste be alleged in his defence where he omits the customary duty of ventilating or of letting in or excluding light;⁶ nor wear and tear serve as his excuse where he or his servants did the damage by thumping the things carelessly about and handling them rudely. Likewise is the carrier denied the privilege of alleging natural spoliation or "act of God" in his defence, where he placed things in close contact, which prudent carriers know should be kept far apart, and so caused mischief; where, for instance, what he perceives to be a bale of silk is set against

¹ *Hastings v. Pepper*, 11 Pick. 41.

² *Packard v. Taylor*, 35 Ark. 402. And see 16 Fed. R. 861.

³ *Kinnick v. Chicago R.* (Iowa), 29 N. W. 772; *The Jason*, 28 Fed. R. 323.

⁴ *The Star of Hope*, 17 Wall. 651.

⁵ *Leech v. Baldwin*, 5 Watts, 446. And see 29 Fed. R. 397.

⁶ *The Ship Invincible*, 3 Sawyer (U. S.), 176; *The America*, 8 Ben. (U. S.) 491.

sulphuric acid or molasses,¹ or breadstuffs are deliberately packed among volatile oils of penetrating flavor.² If bad stowage increases the labor and strain of a vessel in heavy weather, so as to produce a loss of cargo which good stowage would have prevented, the carrier is answerable.³

§ 433. **The same Subject; Bad Stowage in a Vessel; Jettison, etc.** — Goods carried in a vessel should, in general, be stowed under the deck, where they are better protected from action of the elements as well as the depredations of vicious persons, and are likely neither to be swept off nor recklessly thrown overboard in time of peril. The presumption is that a shipper at the present day engages for stowage of his goods under deck; and, by commercial usage, a clean bill of lading legally imports this undertaking so strongly that the contrary cannot be established upon parol evidence.⁴ No sacrifice of goods carried on the deck, though it be by jettison in a sudden storm, can relieve a carrier from responding therefor to the owner, unless he can show that his manner of stowage was sanctioned by commercial usage or specially authorized, or else that such stowage in no sense occasioned the loss.⁵ But he is exonerated where usage sanctions the conveyance of such property above deck,⁶ as perhaps in barges and ferries, which ply for short distances; or if such exposed manner of stowage appear to have been with the due assent of the shipper or owner; or if the situation of the goods had no agency in producing the particular loss, as in case of a total

¹ *Alston v. Herring*, 11 Ex. 822.

² *Gillespie v. Thompson*, 6 E. & B. 478 n.; *The Barque Colonel Ledyard*, 1 Sprague, 530.

³ 16 Fed. R. 148; 29 Fed. R. 373.

⁴ *The Delaware*, 14 Wall. 579; *Newall v. Royal Shipping Co.*, 33 W. R. 342; *Creery v. Holly*, 14 Wend. 26; *Barber v. Brace*, 3 Conn. 9. But cf. *Mr. Justice Story*, in *Vernard v. Hudson*, 3 Sumn. 405, 406; *Bigelow, C. J.*, in *Sayward v. Stevens*, 3 Gray, 97, 101; *The Thorn*, 8 Ben. (U. S.) 3.

⁵ *Ib.*

⁶ See *The Harold Haarfager*, 8 Ben. 216.

jettison, or where some lightning-stroke lays the whole vessel open.¹

No jettison, of course, is excusable which is immediately traceable to the fault of the carrier; as where a shipmaster, in port, throws overboard, to lighten his vessel, goods which he might have safely landed in boats; or finds himself compelled to the sacrifice because of some peril which he brought about through his unskilful navigation, or by overloading the vessel.² Inasmuch as goods shipped on deck and justifiably sacrificed by jettison are not commonly entitled to the benefits of a general average, the carrier ought to have a strong case, in order to compel the owner to bear such a loss.³

§ 434. **Proximate and Remote Cause; Rule further applied to Excuses for Loss.**—The rule of proximate and remote cause is further applied to loss or injury from “public enemies.”⁴ Here, as under our former exception, the overpowering calamity must have been the proximate and immediate cause of the loss; so that the carrier’s want of ordinary care and diligence, as well as his fraud and wilful misconduct, entering as a contributing element into the disaster, would commonly leave him responsible as before.⁵ For the experience of many confirms the remark that the seizure, destruction, or confiscation of personal property on transit, even by public enemies, is by no means so irresistible or beyond the power of a car-

¹ *Bird v. Astcock*, 2 Bulst. 280; *Shackleford v. Wilcox*, 9 La. 38; *Lawrence v. Minturn*, 17 How. 114; 3 Kent Com. 240; *Smith v. Wright*, 1 Caines, 43; *Johnston v. Crane*, 1 Kerr (N. B.), 356; *Gillett v. Ellis*, 11 Ill. 579; *Cram v. Aiken*, 13 Me. 229; *Chevaillier v. Patton*, 10 Tex. 344.

That a railway carrier may take on a platform car a box too large to go into the covered car, if he uses due precaution against exposure to the weather, see 94 N. C. 451.

² *The Portsmouth*, 9 Wall. 682; *Story Bailm.* §§ 525, 530 *a*, 531; *Coggs v. Bernard*, 2 Ld. Raym. 909; *supra*, § 417.

³ See *Cram v. Aiken*, 13 Me. 229.

⁴ See *supra*, §§ 418–420.

⁵ *Holladay v. Kennard*, 12 Wall. 254; *Porcher v. Northeastern R.*, 14 Rich. 181.

rier's prevention, that common prudence and energy may not, in many instances, preserve them; while, on the other hand, opportunity and the prospect of private gain may tempt such a party to collude with his country's foes, at the sacrifice of those who were compelled to trust him.

That proximate and remote cause must be considered where "act of the customer" is set up in defence clearly enough appears from our former statements on this point. This default or misconduct of the carrier's consignor or consignee — in other words, of his customer — must have been the primary and essential cause of the mischief in order to avail the carrier.¹ The same holds true of loss or injury "by the public authority;" an excuse which no carrier is competent to set up where he yields heedlessly to legal process such as any claimant might set in motion under the color of a right, without either notifying his customer to defend the suit or testing the justice of the claim for himself.²

Proximate and remote cause is also regarded in deciding as between an excusable and non-excusable calamity; as, for instance, where a fire (which is not legally excusable) occurs, which, it is claimed, would not have destroyed the goods had not a tempest driven the flames suddenly forward.³

§ 435. **Perplexing Instances of Proximate and Remote Cause; Influence of Carrier's Contributory Negligence.** — If, therefore, the property in transit be lost or impaired, because essentially of the carrier's default of duty, we shall find the carrier held legally to respond to his customer, notwithstanding the further intervention or agency of some act of God or other admitted excuse which aids, but otherwise need not have produced, the mischief. But when the disaster is not so easily

¹ *Supra*, §§ 426, 427

² *Supra*, § 428.

³ Pennsylvania R. v. Fries, 87 Penn. St. 231. See *supra*, § 411 n.

We shall see, in the next chapter, the principle of proximate and remote causes extended to such other exceptions from liability as special contract introduces into the carriage undertaking.

traceable to the carrier's default, and causes primary and secondary, proximate and remote, approach and blend together, the case becomes perplexing, and our precedents often appear discordant. The issue now resolves itself into analyzing the influence upon the disaster of the bailee's contributory negligence, and practically it may be of much consequence in a suit to know upon which party rests the burden of proof. Some authorities, standing fast by the ancient and rigorous policy, incline to rule that the slightest mingling of negligence or misconduct, as co-operative on the carrier's part, should charge him; while others are more lenient to his lighter delinquencies, provided only the act of God or other admitted excuse appear the more immediate and moving cause of the mischief.

§ 436. **The same Subject; English Instances.** — That inflexible adherence to principle in this respect, regardless of popular sympathies or an exceptional hardship, which so won Chancellor Kent's admiration of the common-law doctrine years ago,¹ can hardly be predicated at this day of the English courts. For instance, Brett, J., on a late occasion, thus essayed to define the phrase "act of God:" "The best form of the definition seems to us to be, that the damage or loss in question must have been caused directly and exclusively by such a direct and violent and sudden and irresistible act of nature as the defendant could not by any amount of ability foresee would happen, or, if he could foresee that it would happen, could not by any amount of care and skill resist, so as to prevent its effect." And the decision here was, in effect, to make a sea-carrier liable for an animal whose death was evidently caused by fright and struggling on a rough voyage, without the carrier's fault.² But on appeal the

¹ See 2 Kent Com. 602.

² *Nugent v. Smith*, 1 C. P. D. 19, 34. "It is somewhat remarkable," observed Cockburn, C. J., on appeal, "that, previously to the present case, no judicial exposition has occurred of the meaning of the term, 'act

decision was reversed; and this exposition was condemned as demanding too much of the carrier under the bailment accomplishment. According to Cockburn, C. J., the immunity of the carrier where accident arises from "act of God" must depend on his ability to avert its effects, and the degree of diligence he is bound to apply to that end; if by his default the loss or damage ensues, he remains responsible, though the so-called act of God may have been the immediate cause of the mischief; yet all that can be required of him is that he shall do all that is reasonably and practically possible to insure the safety of the goods. "If," adds this eminent judge, upon a copious review of the English decisions, "he uses all the known means to which prudent and experienced carriers ordinarily have recourse, he does all that can reasonably be required of him; and if, under such circumstances, he is overpowered by storm or other natural agency, he is within the rule which gives immunity from the effects of such *vis major*, as the act of God."¹ In other words, the exertion of ordinary skill and prudence to avert or overcome the disaster appears to be all that the law holds requisite, under the latest English exposition of the carrier's responsibility in this respect.

§ 437. **The same Subject. American Instances.**—In America, where the law of carriers receives more voluminous discussion, the same general inquiry comes up, but, as might be expected of a country less strongly commercial, with more especial reference to railway than ocean carriers; and eliciting, in like manner, a marked diversity of judicial opinion. New York State has set the example of holding the carrier to a strict accountability for contributory negligence manifested on his part. Where a railway company deferred transporting

of God,' as regards the degree of care to be applied by the carrier, in order to entitle himself to the benefit of its protection." S. C., 1 C. P. D. 423, 435.

¹ Nugent v. Smith, 1 C. P. D. 423, 435.

goods immediately, and held them, though with but slight delay, or for what in some States would be considered good excuse, in the freight depot, near the Hudson River, and a sudden flood arose, so as to wet the goods, the highest court of the State refused to excuse the carrier. This delay was deemed delinquency sufficient to make the carrier immediately responsible for the flooding of the goods; and the *onus* of proof was upon this party to establish that no act of his had concurred in or contributed to the injury.¹ But in Pennsylvania, upon not dissimilar facts, a different conclusion had been reached; for goods carried in a canal-boat were injured by the wrecking of the boat in an extraordinary flood; and the court excused the carrier, notwithstanding the lameness of a horse was shown to have prevented the boat from promptly passing the place of danger, whereby the carrier's delay must have contributed to the loss.² More than this, that same Hudson River flood, whose devastation the New York courts visited upon the railway carrier, was, in Massachusetts, held to relieve the company of responsibility under the same circumstances.³ The rule of Pennsylvania and Massachusetts, rather than of New York, received, several years later, the approval of the Supreme Court of the United States:⁴ a sanc-

¹ *Michaels v. N. Y. Central R.*, 30 N. Y. 564; *Read v. Spanlding*, 30 N. Y. 630. See also *Wolf v. American Express Co.*, 40 Mo. 421, where the carrier's co-operative negligence is strongly disfavored.

² *Morrison v. Davis*, 20 Penn. St. 171.

³ *Denny v. New York Central R.*, 13 Gray, 481. Cf. also with New York decisions, *supra*; *Judson v. Western R.*, 4 Allen, 520; *Swetland v. Boston & Albany R.*, 102 Mass. 276; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; *Empire Trans. Co. v. Wallace*, 68 Penn. St. 302.

⁴ *Railroad Co. v. Reeve*, 10 Wall. 176. In this case Mr. Justice Miller thus disposes of the main question: "A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm. Now, when it is shown that the damage resulted from this cause immediately, he is excused. What is to make him liable after this? No question of his negligence arises, unless it is made by the other party. It is not necessary for him to prove

tion which, under all the circumstances, ought to preponderate in American tribunals.

Whether this indicates more, however, than a disposition to indulge the carrier, whose only remissness in contributing to a loss is a not unnatural delay,¹ cannot yet be stated with confidence. But the bearing of these latter decisions appears to be towards the attainment of that same general conclusion to which the latest English authority tends: viz., that the contributory negligence which shall charge a common carrier, notwithstanding the loss was occasioned by act of God or a public enemy, is not slight negligence, or such as renders only bailees for their sole recompense responsible, but ordinary negligence, or the failure to bestow that skill, diligence, and foresight, in which persons ordinarily prudent, of the same class, would not be wanting under the same circumstances; in other words, holding the carrier to that exercise of duty, under all circumstances, upon which we discoursed at the outset.²

§ 438. **The same Subject; Where Disaster was Inevitable, notwithstanding Default.** — Admitting, as we must, the carrier's general responsibility for loss or injury by a disaster which his own negligence or misconduct has materially aided in producing, the question sometimes occurs, how far may this responsibility be overborne by proof that the disaster must inevitably have befallen the goods in transit, even though the carrier had pursued the strict line of duty. Thus, supposing the master of a ship to have deviated so slightly, or for so short a period, that the same tempest which actually wrecked his vessel must infallibly have overtaken it, even if he had

that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it." See, further, *Vail v. Pacific R.*, 63 Mo. 230; *Holladay v. Kennard*, 12 Wall. 254; *Lamont v. Nashville R.*, 9 Heisk. 58; *Nashville R. v. David*, 6 Heisk. 261.

¹ *Supra*, § 404; *post*, c. 6.

² *Supra*, §§ 402-404.

steadily pursued the true course, will he be held liable for the loss of the goods on board? Or must he strictly respond, supposing goods were left on deck, in violation of his duty, and yet the storm that washed them away destroyed likewise all that were stowed in the hold? The Roman law would, under such circumstances, have exonerated the carrier. "If the bailee, to use the Roman expression," says Sir William Jones, "be *in mora*,—that is, if a legal demand have been made by the bailor,—he must answer for any casualty that happens after the demand; unless in cases where it may be strongly presumed that the same accident would have befallen the thing bailed, even if it had been restored at the proper time; or unless the bailee have legally tendered the thing, and the bailor have put himself *in mora* by refusing to accept it: this rule extends, of course, to every species of bailment."¹ Pothier is an eminent authority in favor of the same doctrine.²

Our common law appears to incline in the same direction; permitting the carrier to show, in defence, that although he may have been in default, yet that the loss was independent of such default, and must have happened regardless of it. Thus, if an unseaworthy ship be captured by a public enemy, the carrier may show, as it seems, that, seaworthy or unseaworthy, the ship could not have escaped its captor.³ In several instances, in point of fact, our common carrier, while not altogether blameless, has yet been allowed the full benefit of a loss which was substantially and primarily occasioned by one of the excepted perils.⁴ And certainly, if the carrier has acted with ordinary prudence, skill, and foresight, in endeavoring to prevent or escape the calamity, and his vessel

¹ Jones Bailm. 70. And see Angell Carriers, §§ 203-208; Story Bailm. § 413 *a-d*; *supra*, § 139.

² Pothier Prêt à Usage, n. 55-58; Story Bailm. § 413 *c*.

³ Tindal, C. J., in *Davis v. Garrett*, 6 Bing. 716. And see, as to stowage on deck not producing the loss, *The Rebecca*, Ware, 188; *Gardner v. Smallwood*, 2 Hayw. 349; *supra*, § 431.

⁴ *Supra*, § 437.

is ordinarily seaworthy, it shall not charge him, that his prudence, skill, and foresight, or the condition of his vessel, were not the very best.¹ As for delay or deviation, whereby goods are brought into immediate contact with the excepted peril, we may well conceive of circumstances rendering such delay or deviation not only reasonable, but highly expedient.² All this goes, however, towards justifying, not so much the admission of contributory wrong or default on the carrier's part, despite which the excepted calamity, it is shown, must have happened, as to strike away the link of contribution altogether, and leave the excepted cause in sole operation as the motive of the disaster. Or, it may be said, the bailment of itself mutually implies that in a peculiar and pressing emergency, the carrier may delay or even deviate, observing the bounds of prudence and good faith.³ For the rest, our reports give us, thus far, *dicta*, but not conclusive precedents.⁴ They rule clearly that the *onus*, at all events, rests upon the carrier, whose culpable delinquency apparently helped produce and essentially contributed to the loss, of showing not that the same loss might, but that it must, have happened independently of such delinquency ;⁵ a burden, it must be confessed, not easily to be uplifted, under the variation of circumstances most readily conceivable.

§ 439. **Legal Excuses, how set up ; Presumption ; Burden of Proof, etc.**—The several legal excuses for loss we have thus enumerated are for carriers to set up in defence when charged with a loss or injury. For, to discourage litigation, the common law strongly presumes against every public

¹ See Cockburn, C. J., in *Nugent v. Smith*, 1 C. P. D. 423, 435; *Morrison v. Davis*, 20 Penn. St. 171.

² See *supra*, §§ 403, 404; *The Schooner Sarah*, 2 Sprague, 31.

³ For this suggestion as applied to bailments for hire, *supra*, § 110.

⁴ *Tindal, C. J.*, in *Davis v. Garrett*, 6 Bing. 716; *Parker v. James*, 4 Camp. 112; *Hill v. Sturgeon*, 28 Mo. 323; *Smith v. Whitman*, 13 Mo. 352; *Collier v. Valentine*, 11 Mo. 299; *Hart v. Allen*, 2 Watts, 111.

⁵ See *Phillips v. Brigham*, 26 Ga. 617.

transporter to whom, in the regular course of business, property has been consigned for carriage, which fails in due time to reach its destination reasonably safe and sound. Proof, to this extent, of an owner's or customer's loss or injury, establishes, *prima facie*, the liability of the common carrier to make that loss or injury good, and puts upon him the *onus* of controverting such proof, or of relieving himself by showing that the occasion of loss or injury was such as ought, by law, to excuse him.¹ But while the consignor or owner of goods is not commonly bound to prove how or where the mischief actually happened, — matters whose knowledge, except in special cases, must be within the carrier's peculiar province, if proof be attainable at all, — it is yet incumbent upon such party, as the foundation of his rightful claim, to show a complete delivery of the property to the party exercising the public vocation, and further, that the goods in question were delivered over, at the end of the transit, in the damaged or wasted condition complained of, or not delivered over at all. His showing must be such as leaves it improbable that the loss or injury could have occurred from any other cause than such as leaves a carrier liable.² And whenever the carrier has, in response, brought the loss or injury fairly within one of the foregoing legal exceptions, of act of God, act of public enemy, or act of the consignor or customer, or act of public authority, by ample evidence to that effect, such as imputes no blame to himself, he is not bound to show further, affirma-

¹ Story Bailm. § 529; *Nugent v. Smith*, 1 C. P. D. 19, 423; *Forward v. Pittard*, 1 T. R. 27; *Angell Carriers*, § 202; *Riley v. Horne*, 5 Bing. 217; *Hastings v. Pepper*, 11 Pick. 41; *Hill v. Sturgeon*, 28 Mo. 323; *Murphy v. Staton*, 3 Munf. 239; *Bell v. Reed*, 4 Binn. 127; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Davidson v. Graham*, 2 Ohio St. 131; *Michaels v. New York Central R.*, 30 N. Y. 564; *Montgomery R. v. Moore*, 51 Ala. 394; *Hall v. Cheney*, 36 N. H. 26; *Alden v. Pearson*, 3 Gray, 342; *Van Winkle v. South Carolina R.*, 38 Ga. 32; *Little v. Boston R.*, 66 Me. 239. And see c. 8, *post*.

² *Midland R. v. Bromley*, 17 C. B. 376; *The Falcon*, 2 Blatchf. 64; *Ringgold v. Haven*, 1 Cal. 108.

tively, that there was, in fact, no contributory negligence or misconduct on his part, but may here rest his case, and leave the other to show such negligence or misconduct, as proximate cause of the mischief, by way of rebutting testimony if he can.¹

Where goods are found damaged at the end of the transit, and it is left, on the whole, in doubt, upon the owner's suit, what the real cause of injury was, so that the loss or damage may as well be attributed to the carrier's excepted cause as to the carrier's negligence, the plaintiff, it is held, cannot recover.² Damage which appears to be the result of the inherent nature or inherent defect of the thing of course relieves the carrier.³ But where the evidence imputes actual carelessness or misconduct to the carrier, on the owner's showing, all the more surely is his case established against the carrier.⁴

§ 440. **Carrier not a Technical Insurer; Right of Insurance Company.** — It is often said that the law makes the carrier an insurer; but by this we are not to understand the word "insurer" in its present technical sense. For the rule of "abandonment," whereby the owner may, in case of partial injury, reject the uninjured part, and claim indemnity as for a total loss, does not apply here, as it would in the law of insurance.⁵

Where goods are insured by the carrier's customer against fire, and a loss occurs, the insurance company upon paying for the damage becomes subrogated to the customer's rights

¹ *Nugent v. Smith*, 1 C. P. D. 423; *Vail v. Pacific R.*, 63 Mo. 230; *Hussey v. The Saragossa*, 3 Woods, 380; *Railroad Co. v. Reeve*, 10 Wall. 176; (Mo.) 1 S. W. 327.

As to the burden of proof under special contract modifications of liability, see next chapter. See further, c. 8, *post*. And see, in general, *supra*, § 23.

² *Muddle v. Stride*, 9 C. & P. 380; *Clark v. Barnwell*, 12 How. 272.

³ As if a horse's sickly condition or the decay of perishable articles should appear the natural result of the transportation. *Hussey v. The Saragossa*, 3 Woods, 380; 12 Fed. R. 876.

⁴ See *Little v. Boston R.*, 66 Me. 239.

⁵ *Nettles v. Railroad Co.*, 7 Rich. 190; *Michigan Southern R. v. Bivens*, 13 Ind. 263; *Henderson v. Ship Maid of Orleans*, 12 La. Ann. 352.

against the carrier, and may recover the entire loss and not merely the amount of insurance paid the customer.¹

§ 441. **Care and Diligence is according to Circumstances.** — We may add that the occasion presented, the nature and quality of the subject-matter, the character of the transit, and other kindred circumstances, may determine, in a particular case, what care and diligence were requisite on the carrier's part. For, as it was observed in a recent case, what would be sufficient care in case of ponderous articles not liable to be deteriorated by exposure might be most palpable neglect in the case of costly and perishable goods.²

§ 442. **Instances of Mixed Custody considered; Hand-baggage; Animals.** — A few special instances of a peculiar cast involving a mixed custody may serve to illustrate further the Anglo-Saxon doctrine of a common carrier's liability.

1. Baggage carried by passengers, and particularly their hand-baggage, and money taken on the person. This topic will be treated in place hereafter.³

2. As to live animals. Litigation over the liability for the transportation of animals involves two elements of especial difficulty: one, the animal's own nature and disposition; the other, the behavior of the owner, or his drover or servant, who may have accompanied the creature on the transit. A public carrier incurs all the usual risks of his profession at the common law, with reference to brute creatures that he undertakes to transport; for these are chattels.⁴ He must fasten up and secure the animal well, to prevent its escape;⁵ and must put

¹ *Mobile R. v. Jarey*, 111 U. S. 584.

² *Wolf v. American Express Co.*, 43 Mo. 421. And concerning the influence of usage among carriers, special contract, and legislation, upon the issue of negligence, see next c.

³ See *post*, Part VII. c. 4.

⁴ *Angell Carriers*, § 214; *Story Bailm.* § 576; *Nugent v. Smith*, 1 C. P. D. 19, 423; *McCoy v. K. & D. M. R.*, 44 Iowa, 424. Cf. *supra*, § 370, and *n.*

⁵ *Stuart v. Crawley*, 2 Stark 323; *Porterfield v. Humphreys*, 8 Humph. 497. Cf. *Blower v. Great Western R.*, L. R. 7 C. P. 655.

it in some suitable place which may afford reasonable shelter and protection. He must not endanger the creature's life and health by neglecting to provide food, water, and the means of repose or needful exercise on the journey.¹ In case of delay or accident, from whatever cause, he must reasonably regard the comfort and safety of the creatures intrusted to his care, whether in keeping them on board or unloading and re-loading them.² Where cattle are transported by rail in large numbers, cars of a peculiar construction are commonly used; but whatever the vehicle, or part of a vehicle, assigned to animals, this must be of strength reasonably sufficient to keep them from breaking through, escaping, or doing themselves serious damage, and in all respects well adapted for the peculiar transportation purpose.³ In short, the carrier of animals is responsible for any loss or injury which the pursuance of ordinary diligence and skill in his vocation might have obviated; and he will be charged as their insurer, save so far as he can bring himself within some one or more of the recognized exceptions of the law.⁴

But the common carrier of animals does not necessarily make himself an insurer against a loss or injury which is really attributable to the nature, habits, disposition, and propensities of the animals, and such as ordinary diligence on his

¹ *Illinois Central R. v. Adams*, 42 Ill. 474; *Toledo R. v. Thompson*, 71 Ill. 434; *Harris v. Northern Indiana R.*, 20 N. Y. 232; *Dunn v. Hannibal R.*, 68 Mo. 268.

² *Kinnick v. Chicago R. (Iowa)*, 29 N. W. 772.

³ Cf. *Harris v. Northern Indiana R.*, 20 N. Y. 232; *Smith v. New Haven R.*, 12 Allen, 531; *Welsh v. Pittsburg R.*, 10 Ohio St. 65; *Indianapolis R. v. Strain*, 81 Ill. 501; *Pratt v. Ogdensburg R.*, 102 Mass. 557; *Railroad Co. v. Pratt*, 22 Wall. 123; *Hawkins v. Great Western R.*, 17 Mich. 57; 9 N. E. 667; 29 Fed. R. 373. And see *supra*, § 402, as to seaworthiness.

⁴ The owner may bring his action against the carrier for injury done to his animal while in transit, although he has given no notice to the carrier of the animal's injury, nor offered it to be cared for. *Evans v. Dunbar*, 117 Mass. 546.

part would not probably have prevented. Should the animal sicken, pine away, and die a natural death; or, because of fright, restlessness, or viciousness, inflict injury on itself or other animals of the same owner; or even should it escape,—it is the owner who must bear the loss, so long as the carrier appears to have faithfully performed his own duty as the undertaking bound him.¹ And the carrier has a clearer excuse where such mischief develops in the course of some irresistible, natural, and hence excusable calamity.² The principle of this exception is analogous to that already noticed, where goods spoil and deteriorate from inherent defects, and other natural causes; no blame attaching to the party transporting them.³

§ 443. **The same Subject; Animals.**—If the consignor, or his drover or servant, as is now quite frequent, travels with his own live-stock, as in a cattle-train, he relieves the carrier from the active care of the creatures, in so far as he assumes such care for himself. Within his understood sphere of action, as for feeding and watering, or the treatment of bruises and disease, a person thus travelling in charge of his stock is more immediately answerable than the carrier; and for negligence or misconduct on his part, productive of injury, or, indeed, for damage occasioned by him, whether culpably or not,⁴ the carrier may set up that it was the consignor's or customer's act.⁵ This assumes, however, that the carrier was

¹ *Blower v. Great Western R.*, L. R. 7 C. P. 655; *Kendall v. London R.*, L. R. 7 Ex. 373; *Smith v. New Haven R.*, 12 Allen, 531; *Clarke v. Rochester R.*, 4 Kern. 570; 13 Ill. App. 251; *Conger v. Hudson River R.*, 6 Duer, 375; *Hall v. Renfro*, 3 Met. (Ky.) 51; *Mynard v. Syracuse R.*, 71 N. Y. 180. See *Sturgeon v. St. Louis R.*, 65 Mo. 569; *Evans v. Fitchburg R.*, 111 Mass. 142.

² See *Nugent v. Smith*, 1 C. P. D. 19, 423; *Gabay v. Lloyd*, 3 B. & C. 79; *Story Bailm.* § 576; *Angell Carriers*, § 214

³ *Supra*, § 416.

⁴ *Hart v. Chicago R. (Iowa)*, 29 N. W. 597. Here the fodder was set on fire by the drover in charge of the live-stock, though, as it was claimed, not carelessly.

⁵ *Wilsons v. Hamilton*, 4 Ohio St. 722; *Evans v. Fitchburg R.*, 111 Mass. 142.

not himself at apparent fault; for, whether in intermeddling, or while attending to running the train or other transit duties of his own or supervising the carriage of the creatures, the carrier continues responsible for all such damage as his misconduct or want of ordinary diligence may have inflicted;¹ and as a public carrier, he continues in a considerable measure the insurer of such freight.

If an entire railway car be chartered for the cattle of a particular party who takes entire charge of the loading, the company is not to be held liable for damage caused by such improper loading;² and, as we have seen, the consignor's selection of a cattle-car may, to some extent, and even though the car be rather an unsuitable one, establish a qualification of the carrier's legal responsibility.³

§ 444. **The same Subject.**—Loss by the animal's running away should usually justify a presumption that the carrier did not have the creature fastened up properly. And yet, so nicely does the law adjust its reckoning by the facts, for the escape of a dog, delivered with only a string about its neck, a carrier was once held liable, when the dog slipped the noose, because, as it was alleged, the carrier should have secured the creature better;⁴ but where a dog was delivered, having on a leather collar and strap, and after being fastened up thereby, slipped its head from the collar, and ran off, it was later adjudged that the loss was by the owner's act, since the carrier had fastened the dog by means apparently sufficient, which the owner had himself provided.⁵ The

¹ *Gill v. Manchester R.*, L. R. 8 Q. B. 186; *Sneesby v. Lancashire R.*, L. R. 9 Q. B. 263; s. c. 1 Q. B. D. 42; *Powell v. Pennsylvania R.*, 32 Penn. St. 414; *Illinois Central R. v. Adams*, 42 Ill. 474; *Cragin v. N. Y. Central R.*, 51 N. Y. 61.

² *East Tennessee R. v. Whittle*, 27 Ga. 535.

³ *Harris v. Northern Indiana R.*, 20 N. Y. 232; *supra*, § 422.

⁴ *Stuart v. Crawley*, 2 Stark. 323.

⁵ *Richardson v. North-Eastern R.*, L. R. 7 C. P. 75. And see *Cantling v. Hannibal R.*, 54 Mo. 385.

consignor of animals may, of course, be to blame for the manner in which he has loaded or fastened the creatures on board, so far as he assumed to do this; and the fact that he has had opportunity to know the creature's propensities, while the carrier has not, is a circumstance which calls for special heed on the part of the former.¹

§ 445. **Instance of Ferry Transportation.** — 3. Ferrymen and ferry companies incur risks, subject to peculiar qualifications, with respect to the horses and teams they transport; and, as this business is usually conducted at the crowded centres of trade, the ferry seldom takes entire charge of such property, but leaves the driver to cross in charge of his team. A ferryman is bound to keep his slips in good order, and to provide suitable means of ingress and egress; to have a boat staunch, strong, and seaworthy, well constructed and fitted up for its peculiar service, and properly manned, equipped, and managed; and to maintain reasonable safeguards, and enforce such customary rules, as may keep the boat well trimmed on its passage, and promote the general security and comfort in person and property of all concerned.² He must not overload, nor venture out imprudently, in bad weather, without the means of averting possible dangers.³ Should damage result from his violation of these plain duties, the carrier must respond to his patron who suffers in consequence; as where his boat was not well fastened at the landing-place,⁴ or he omitted to put his chain up at the end of the boat,⁵ or negligently suffered the slip to be out of

¹ *Evans v. Fitchburg R.*, 111 Mass. 142; *Rixford v. Smith*, 52 N. H. 355. See also (Tex.) 1 S. W. 142

² *Supra*, § 395; *Angell Carriers*, § 82. That ferrymen are common carriers, see *supra*, § 351.

³ *Angell Carriers*, § 165; 1 Roll. Abr. 10, pl. 18; *Cook v. Gourdin*, 2 Nott & McC. 19.

⁴ *Pomeroy v. Donaldson*, 5 Mo. 36.

⁵ *Ferris v. Union Ferry Co.*, 36 N. Y. 312; *Miller v. Pendleton*, 8 Gray, 547.

repair.¹ A ferryman's rights, we have seen, are commensurate with the responsibilities devolving upon him;² and he must suffer the consequences of his culpable negligence, even should the property lost be a horse and carriage over which the owner, or his driver, exercises a certain control.³

But if the ferryman discharge his duty in the premises with ordinary diligence and discretion, and the loss be occasioned by the animal's restiveness, viciousness, or other inherent fault, the owner must suffer for it;⁴ and so, too, where the owner or his servant, instead of surrendering the animal to the ferryman's entire custody, drives on board, selects his place, and, undertaking, in fact, to look after his creature, occasions the damage by neglecting to do so.⁵

§ 446. **Expressions in Bills of Lading; "Perils of the Sea," etc.**—The common-law doctrines of liability we have thus discussed might be further illustrated by reference to the expressions which have long been current in bills of lading and similar documents of common carriage. Phrases of corresponding tenor might be cited, too, from marine insurance policies.⁶ But any and all terms of exception, such as express contract creates in favor of the carrier, must

¹ Willoughby v. Horridge, 12 C. B. 742.

² *Supra*, § 354; Claypool v. McAllister, 20 Ill. 504.

³ Willoughby v. Horridge, 12 C. B. 742.

⁴ Hall v. Renfro, 3 Met. (Ky.) 51; Lewis v. Smith, 107 Mass. 334; cases *supra*, §§ 442-444.

⁵ White v. Winnisimmet Co., 7 Cush. 155. Cf. May v. Hanson, 5 Cal. 360.

⁶ The stated exceptions under a bill of lading or stated risks in a policy of insurance vary, of course, with time and circumstances and the changing methods of transportation. But the following are the phrases most commonly employed in carriage by water, to which special allusion is made in the text:—

1. *Exception of "perils of the sea,"* or "*perils of navigation.*" The former expression, which for a long time was the only one used by English carriers in merchant vessels under bills of lading, covers, doubtless, natural accidents peculiar to that element. But the phrase is by no

be distinguished from those three sanctioned and firmly established by our Anglo-Saxon public policy, and which

means synonymous with "act of God;" for, excluding on the one hand altogether the idea of land calamities, it has on the other hand been judicially interpreted so as to protect various losses by sea which are not referable, on the principles already discussed, to the intervention of Providence. Thus, loss by impressment has been excused as a "peril of the sea." *Hodgson v. Malcolm*, 5 B. & P. 336. So has loss by the collision of vessels, when imputing no blame to the carrier. *Buller v. Fisher*, 3 Esp. 67; *Smith v. Scott*, 4 Taunt. 126. And, likewise, a capture by pirates on the high seas. *De Rothschild v. Mail Steam Packet Co.*, 7 Ex. 734; *Pickering v. Barclay*, 2 Roll. Abr. 248; all of which are the result of human intervention, and not the "act of God." And see *Story Bailm.* § 512; *Abbott Shipping*, 11th Eng. ed. pt. 4, c. 6, § 2.

"Perils of navigation" is a phrase of much the same import, which is now sometimes preferred to "perils of the sea," as less technical.

But loss by fire is not excepted as a "peril of the sea," or a "peril of navigation." *Morewood v. Pollok*, 1 E. & B. 743; *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420; nor is loss by explosion: *Propeller Mohawk*, 8 Wall. 153; *The Barque Edwin*, 1 Sprague, 477; nor loss by the depredation of rats and vermin: *Laveroni v. Drury*, 8 Ex. 166; *Dale v. Hall*, 1 Wils. 281; *Hunter v. Potts*, 4 Camp. 203. Judge Story inclines to the view favored by the civilians Emerigon and Roccus, that if the shipmaster keeps a cat, or, as we may say, uses due diligence to keep rats away, he shall in this respect be excused: *Story Bailm.* § 513, and authorities cited; but the English courts do not in this respect sustain him. See also 3 Kent Com. 300 *n.*; *Angell Carriers*, § 170; *Aymar v. Astor*, 6 Cow. 266; *Kay v. Wheeler*, L. R. 2 C. P. 302; *contra*, *Garrigues v. Coxe*, 1 Binn. 592. Nor is damage done to a ship's bottom by worms in the course of the voyage a "peril of the seas," or of "navigation:" *Story Bailm.* § 513; *Rohl v. Parr*, 1 Esp. 444; *Martin v. Salem Marine Ins. Co.*, 2 Mass. 420; *Hazard v. New England Marine Ins. Co.*, 1 Sumn. 218; s. c. 8 Pet. 557; for surely every vessel ought to be reasonably seaworthy while in active use. Nor, of course, is a damage happening on land and while the vessel remains in port undergoing repairs. *Thompson v. Whitmore*, 3 Taunt. 227.

When a carrier vessel taken in tow by a ship of war has to crowd sail during a gale of wind, whereby her cargo is injured, this has been called a loss by "peril of the sea." *Hagedorn v. Whitmore*, 1 Stark. 157. So has striking the ground, running on unknown and hidden obstructions, and otherwise encountering loss from those natural causes, pertaining to the element, which might equally well be said to arise *ex vi divina*. *Angell Carriers*, §§ 166, 180; *Potter v. Suffolk Ins. Co.*, 2 Sumn. 197. Also

this chapter has aimed to set forth; viz., act of God, act of public enemies, act of consignor or customer; to which we

damage by sweating, or condensation of moisture in passing from a warm to a cold climate. *McKinlay v. Morrish*, 21 How. 343.

But whenever collision occurs, not through the fault of the other vessel, nor so as to acquit both vessels of blame, but by reason of the negligence of the carrier vessel in question, the latter cannot ascribe the loss to "peril of the seas" or a "peril of navigation." *Lloyd v. Collier Co.*, 3 H. & C. 284; *Grill v. Collier Co.*, L. R. 1 C. P. 600; s. c., on appeal, L. R. 3 C. P. 476. And see *Converse v. Brainerd*, 27 Conn. 607. And the same principle of proximate and remote cause of loss applies, upon which our text discourses under "act of God," etc. For the rational understanding of these exceptional phrases is, that the carrier shall not, by misconduct, or the failure to perform the functions of his calling with ordinary skill and diligence, invite, so to speak, the peril, and occasion in fact the loss. See *Angell Carriers*, §§ 167, 173; *Story Bailm.* §§ 512 *a*, 515; 3 Kent Com. 216, 217; *Schooner Reeside*, 2 Sumn. 571; *McArthur v. Sears*, 21 Wend. 190, 199. The carrier is not, to be sure, compelled to provide a vessel exceptionally weather-proof or seaworthy. *Amies v. Stevens*, 1 Str. 127. But he must have a reasonably weather-proof and seaworthy vessel; and if loss occurs because he has not one, or through unreasonable deviation, bad stowing, overloading, bad steering, bad management of the vessel or its cargo, insufficient equipment, or other culpable neglect of duty, this shall not be excused him as a peril of the seas or of navigation. See *The Star of Hope*, 17 Wall. 651; *Putnam v. Wood*, 3 Mass. 481; *Davis v. Garrett*, 6 Bing. 716; *Crosby v. Fitch*, 12 Conn. 410; *Charleston Steamboat Co. v. Bason*, Harper, 262; *Story Bailm.* § 519 *a*; *Hand v. Baynes*, 4 Whart. 204.

On the whole, the precise scope of the foregoing expressions is not readily gathered. Gould, J., in *Williams v. Grant*, 1 Conn. 487, 492, holds that "act of God" and "perils of the sea" signify one and the same thing. And see *Crosby v. Fitch*, 12 Conn. 410, 419. But, though enlightened jurists might wish this supposition correct as concerns water transportation, the precedents we have cited prove the reverse; and this too, notwithstanding the just criticism that, in permitting the immediate acts of third persons to pass as a peril of the sea, we open to the carrier that very door for collusion and fraud which public policy barred so closely. See Cowen, J., in *McArthur v. Sears*, 21 Wend. 190.

2. *Exception of "dangers," "accidents," etc.* "Accident" excludes human design; while "danger" may be considered a generic term, of which "peril" is the specific, as importing some imminent danger. But whether an exception of "dangers and accidents of the seas and navigation" is to be construed as essentially different from "perils of the seas,"

have added, act of public authority. These and other contract exceptions remain for discussion in our next chapter.

may well be doubted. In an English case, where a vessel arrived in port, and began discharging her cargo, and while so doing, most of the crew having been dismissed, the tackling broke which fastened the vessel to a lighter, and she canted over so that water came into her port-holes and damaged the goods, a clause like this was construed into an exemption. The case is not, however, fully reported. *Laurie v. Douglas*, 15 M. & W. 746.

3. *Exception of "dangers" or "perils" of the "river," of "lake navigation," etc.* Clauses of this description are often found in modern bills of lading, but less in Great Britain than America, where inland navigation is of so vast consequence. By such expressions, ordinary dangers or perils, corresponding to those of the sea, which attend the inland navigation referred to, are mainly intended. *Transportation Co. v. Downer*, 11 Wall. 129; *McArthur v. Sears*, 21 Wend. 190; *Angell Carriers*, § 168; *Jones v. Pitcher*, 3 Stew. & P. 135. But the peculiarities which distinguish transit by inland waters from that by sea are not to be forgotten. Thus, "dangers of lake navigation" will include the danger which arises from shallowness of the waters at the entrance of harbors formed from them. *Transportation Co. v. Downer*, 11 Wall. 129.

A loss by collision without the carrier's fault, if occurring on the lake or river, would by analogy fall within the stated exception. *Jones v. Pitcher*, 3 Stew. & P. 135; *Whitesides v. Thurlkill*, 12 Sm. & M. 599; *Hays v. Kennedy*, 41 Penn. St. 378. Not, however, following the same analogy, a loss by fire or explosion: *Garrison v. Memphis*, 19 How. 312; *Cox v. Peterson*, 30 Ala. 608; *Hibler v. McCartney*, 31 Ala. 501; nor a loss by rats or vermin: *Kay v. Wheeler*, L. R. 2 C. P. 302; nor damage such as evinces that the vessel was not reasonably fit for its peculiar service. For, whether carriage be by ocean or inland waters, the same parity of reasoning applies to perils of this description. As to piracy, however, it might be otherwise; for this is a crime which has always been associated, not with inland waters, but the high seas. *King v. Shepherd*, 3 Story, 349.

Collision, or other loss, occasioned by the carrier's misconduct and want of ordinary diligence, must, of course, fail of exemption under clauses like these. For, as before, the "danger" or "peril" comprehends such only as the carrier's exercise of ordinary skill, judgment, foresight, and diligence in the performance of his duty is unable to avert. *Whitesides v. Russell*, 8 W. & S. 44; *Turney v. Wilson*, 7 Yerg. 340; *Williams v. Branson*, 1 Murph. 417; *Marsh v. Blyth*, 1 Nott & McC. 170;

Hill v. Sturgeon, 28 Mo. 323; Angell Carriers, § 168; Grey v. Mobile Trade Co., 55 Ala. 387. And it is peculiarly incumbent upon a carrier who navigates inland waters to avoid running ashore, to keep clear of other craft, and to look out for bridges. See The Lady Pike, 21 Wall. 1; The Mohler, 21 Wall. 230.

4. *Exception of "restraint of princes," "losses by the king's enemies," etc.* It is held that the exception "restraint of princes" extends to the hostile detention of goods within a besieged city or town; siege and blockade standing on an equal footing in this respect. Rodocanachi v. Elliott, L. R. 8 C. P. 649. Losses by "king's enemies" or "public enemies" are now quite often formally excepted under bills of lading; but, according to the better reason, this exception will equally prevail through operation of the common law, notwithstanding the bill of lading makes express reference only to "perils of the sea." Story Bailm. § 550; Gage v. Tirrell, 9 Allen, 299.

5. *Miscellaneous phrases of exception.* The present tendency of common carriers and insurers is to multiply words and expressions, so as more clearly to except particular perils, dangers, and accidents, which are not embraced in general phrases like the foregoing. How eagerly, in fact, railways and ship-owners run to cover behind special contract provisions of their own framing will better appear in our next chapter. Some of the more striking of these miscellaneous exceptions, however, are here collected for the reader's examination.

Thus, "stranding" is found specially excepted in bills of lading or insurance policies not of very recent date. Kingsford v. Marshall, 8 Bing. 458; Burnett v. Kensington, 7 T. R. 210. "Jettison and stranding" is an exception considered in Newall v. Royal Shipping Co., 33 W. R. 342. Another express exception, now common, is that of loss by "fire," or "accidental fire," "explosion," etc. Steamboat Sultana v. Chapman, 5 Wis. 454; Bank of Kentucky v. Adams Express Co., 93 U. S. Supr. 174; West v. Steamboat Berlin, 3 Iowa, 532. See the Iddo Kimball, 8 Ben. (U. S.) 297. Another is loss by "thieves" or "robbers." Taylor v. Liverpool Steam Co., L. R. 9 Q. B. 546; De Rothschild v. Steam Packet Co., 7 Ex. 734. Another is "damage to goods which can be insured against;" a phrase referring to damage by the loss or destruction of the goods, but not to loss by their abstraction. Taylor v. Liverpool Steam Co., L. R. 9 Q. B. 516. Another is "dangers of the roads," which commonly means, as employed in water carriage, dangers of marine roads; or, if in land carriage, then such dangers as the overturning of a carriage in rough and bad places. De Rothschild v. Royal Mail Steam Packet Co., 7 Ex. 734. Another is loss by "capture." Losses by vermin, by leakage, by breakage, by pilferage, by accidents of machinery, and the like, are also found expressly excepted; in short, the enumeration takes often a very wide range, making verbal mention even of the common-law instances of exemption at the same time. See De Rothschild v. Royal Mail

Steam Packet Co., 7 Ex 734; *Taylor v. Liverpool Steam Co.*, L. R. 9 Q. B. 546; *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Edwards v. Steamer Cahawba*, 14 La. Ann. 224; *The Pereire*, 8 Ben. 301.

The courts, in construing all such phrases as these, will very properly decline to infer a mutual intention that the loss shall excuse the carrier, regardless of his agency therein. Hence, under an exception of "fire," "theft," "capture," "leakage," "breakage," "jettison and stranding," and the like, the peril stated must have been the real cause of damage; not the dereliction of duty, culpable negligence, or bad conduct of the carrier himself, without which the disaster would not have happened: *Steamboat Sultana v. Chapman*; *Bank of Kentucky v. Adams Express Co.*; *Taylor v. Liverpool Steam Co.*, *supra*; *Phillips v. Clarke*, 2 C. B. n. s. 156; *Mynard v. Syracuse R.*, 71 N. Y. 180; *Pennsylvania R. v. Miller*, 87 Penn. St. 395; *Hunnewell v. Taber*, 2 Sprague, 1; *The America*, 8 Ben. 491; *Newall v. Royal Shipping Co.*, 33 W. R. 342; though, whether such construction be founded in a fair interpretation of what the parties meant, or a deeper public policy against which private convention is powerless, is not universally settled in England and America, as the next chapter will show. A valuation per head of cattle by way of limiting the amount in case of loss is held not to apply to damage caused by sending the animals in a ship which has not been properly cleansed and disinfected. *Tattersall v. Nat. Steamship Co.*, 12 Q. B. D. 297.

We may here add that, in general, causes of exemption enumerated under bills of lading and insurance policies are not to be extended, by inference, for the carrier's undue advantage. For instance, a loss by theft or robbery, when committed by persons on board ship, or by persons coming to the vessel while not on the high seas, is not a "piracy," nor, of course, a peril of the seas. *King v. Shepherd*, 3 Story, 349; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Ex. 734. By "thieves" is meant, presumably, thieves external to the vessel or other vehicle, and not a thievish servant, sailor, or passenger. *Taylor v. Liverpool, &c. Steam Co.*, L. R. 9 Q. B. 546. Even where "theft" or "robbery" or "barratry of master and mariners" is excepted, the carrier has the *onus* of showing by whom the crime was committed; and if he cannot so clear himself, the owner may recover. *Ib.* But the New York rule here relieves where it is shown that the purser committed the theft. *Spinetti v. Atlas S. S. Co.*, 80 N. Y. 71. Embezzlement is not a "peril of the seas." *Ib.*; *King v. Shepherd*, 3 Story, 349. Nor can "dangers of the roads" be said to include dangers from highwaymen or other human violators of the law. *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Ex. 734.

Finally, inasmuch as the special enumeration of perils or dangers of the seas has for its primary object that of enlarging the common-law exemption of "act of God," it will not be readily assumed that the carrier meant thereby to exclude the privilege of setting up any of his other

common-law excuses, such as act of public enemies or of the customer. Even should he give a bill of lading for delivering goods "the dangers of the seas only excepted," the inference is not conclusive that he undertook to be responsible for losses arising from all other causes, such as the act of "public enemies." *Gage v. Tirrell*, 9 Allen, 299. And see *Morrison v. Davis*, 20 Penn. St. 171; Story Bailm. § 550.

The reader should study the foregoing note in connection with our next chapter. Further instances of exceptions under a bill of lading may be found in 5 Myer Federal Decisions, "Carriers," §§ 287-715.

CHAPTER V.

USAGE, SPECIAL CONTRACT, AND LEGISLATION, AFFECTING THE
COMMON CARRIER'S BAILMENT RESPONSIBILITY.

§ 447. **Modern Qualifications of Carrier's Responsibility.** — Were the common carrier's bailment responsibility dependent entirely upon the rules set forth in our preceding chapter, its breadth and compass might by this time have been grasped by the reader with tolerable firmness; notwithstanding that quivering play of proximate and remote cause, of divine and human agency, of contributory negligence now on the bailee's and now on the bailor's part, which so eludes the effort to generalize broadly from precedents and the given facts of a particular case. But the Anglo-Saxon carrier, grown to manhood with the cords about his limbs which public policy fastened there while he was an infant, has struggled with more purpose to shuffle them off than has the law to knot them tighter; and in the course of events the force of ancient maxim has been so considerably spent, that we seem to have passed only through the outer hall, in this investigation, so as now to stand where inner chambers are seen opening one into another and stretching far away.

We are in this chapter to consider how far bailment responsibility as a common carrier may become specially qualified, so as to impose upon one who exercises his public vocation in a given case greater, or, as far more commonly happens, less risk in performing the transportation engagement. The old priming is overlaid in these days with coats of diverse tints; and while the basis of our bailment responsibility continues, as already shown, non-exemption, save for act of God, act of public enemies, and act of consignor or customer, and

act of public authority, special variance in responsibility may be established: (I.) by usage; (II.) by special contract; or (III.) by legislation. Under, then, these three separate heads in order, which suggest qualifications possible in any bailment relation, we shall discourse in the present chapter.

§ 448. **Carrier's Responsibility affected by Usage.**—I. The carrier's bailment responsibility as affected by usage. Usage, in its legal aspect, shapes and modifies a contract only so far as some uniform, reasonable, and continuous business method of the locality may be taken to have influenced the mutual intent of both parties concerned in a particular transaction. Custom antedates judicial sanction in most instances; and not to recognize its just force as shaping the social and business intercourse of mankind would be to set the courts, whose machinery was contrived for bending individuals to the public will, into hopeless encounter with the public will itself and the irresistible forces of human society.

Usage distinguishes between carriage by land and carriage by water; and in either branch of the business permits one to confine himself to special modes of locomotion, to choose specific routes with fixed termini, and, in a measure, to put definite limits to the kinds of property or the classes of customers he purposes dealing with.¹

Usage among ordinarily prudent carriers of the same class under similar circumstances will largely determine, too, what care, skill, and diligence should be employed towards averting or lessening the injurious consequences of a disaster otherwise excusable.² Usage may thus enlarge rather than diminish the scope of a carrier's duties.³ But usage cannot be set up to absolve a carrier from the ordinary duties which public

¹ *Supra*, § 378. And see (Cal.) 11 Pac. R. 686.

² *Baxter v. Leland*, 1 Blatchf. (U. S.) 526; *The Schooner Reeside*, 2 Sumn. 567; *Rich v. Lambert*, 12 How. 347.

³ Thus, if it be the custom of an express company to seal valuable packages, the omission to do so may be considered culpable negligence. 7 Col. 43.

policy, his general undertaking, or an express promise may have bound him to; instead of diverting, it shapes the natural course of the current; and its controlling influence is spent, after all, within narrow and well-recognized confines.¹

§ 449. **Carrier's Responsibility affected by Special Contract.**

—II. The carrier's bailment responsibility as affected by special contract. There never was doubt that the common carrier, like other bailees, might either limit or extend his general obligation in a particular transaction by some special acceptance or express agreement with his customer. But whether private agreement can thus be made to thwart and defeat the well-considered policy of our law, and if so, to what extent, is a vital issue on which the later English and American courts have asserted their authority so differently, within their respective jurisdictions, that the course of their decisions should be presented separately, in order to be intelligently comprehended and brought into comparison. At the same time, our general theory must avail that, as in all bailments, no special contract should transcend the limits defined by public policy, whatever those limits may be.²

§ 450. **English Doctrine of Contract Qualification traced down.**

—1. To speak of the English doctrine. Lord Coke and Sir Matthew Hale early intimated that the common carrier had the right to make a qualified acceptance, so as not to be chargeable generally on his undertaking.³ Lord Mansfield⁴ and Lord Kenyon⁵ emphasized this view of the law, which, by

¹ See *Newall v. Royal Shipping Co.*, 33 W. R. 342; *Merx v. Steamship Co.*, 22 Fed. R. 680; *Coxe v. Heisley*, 19 Penn. St. 243; *Cox v. Peterson*, 30 Ala. 608; *Steamboat Sultana v. Chapman*, 5 Wis. 454; *McMasters v. Penn. R.*, 69 Penn. St. 374.

² *Supra*, § 20.

³ See *Southcote's Case*, 4 Co. 84 n.; *Mors v. Slue*, 1 Vent. 190, per Lord Hale.

⁴ *Gibbon v. Paynton*, 4 Burr. 2298.

⁵ *Anonymous v. Jackson*, Peake Add. Cas. 185. And see Lord Kenyon, in *Hide v. Trent & Mersey Nav. Co.*, 1 Esp. 36.

the beginning of the present century, had become so rooted in the English mind that the almost universal practice in the kingdom of common carriers by land and water had become to except, under a special contract, various risks of loss from which the common law itself would not have excused them. This course of business, which no English court of justice had ever denounced, and to which Parliament itself had recently given a colorable sanction, Lord Ellenborough felt compelled, in an important case coming before him in 1804, to uphold, notwithstanding the weighty argument made by opposing counsel, to the effect that this special acceptance of the carrier was in fact subversive of the time-honored policy of the law, regarding parties who exercised this vocation.¹

The old mode of declaring against carriers in common-law practice was on the custom of the realm; but it had now come to be in assumpsit for these special acceptances, as though the particular contract, and not public policy, should govern the bailment transaction.² Gradually the English doctrine adapted itself to this latter theory. And though, up to 1830, the weight of legal authority in Great Britain appears to have favored treating the carrier as liable, at all events, for the fraud, misconduct, or gross negligence of his servants,³ the influence of the Carriers' Act passed in that

¹ *Nicholson v. Willan*, 5 East, 507. The effect of the special acceptance here was to relieve a carrier by stage altogether from liability for parcels over a certain value, unless specially booked and paid for as freight. And see *Maving v. Todd*, 1 Stark. 72 (A. D. 1815), where Lord Ellenborough ruled that carriers might thus exclude all responsibility for losses by accidental fire. It was submitted on behalf of the owner of goods that, hitherto, carriers of this sort had only limited their responsibility to a certain value; but his Lordship replied: "Since they can limit it to a particular sum, I think they may exclude it altogether;" and he further expressed regret that the law was such that carriers could make their own terms, for "it leads to very great negligence."

² *Anonymous v. Jackson*, Peake Add. Cas. 185, per Lord Kenyon.

³ *Blackburn, J.*, in *Peck v. North Staffordshire R.*, 10 H. L. 473, 494; *Story Bailm.* §§ 507, 519; *Ellis v. Turner*, 8 T. R. 531; *Garnett v. Willan*, 5 B. & Ald. 53; *Bodenham v. Bennett*, 4 Price, 34.

year, and the decisions which presently followed by way of construing its provisions, came to establish the reverse.¹ By the middle of this nineteenth century it became clearly settled in Great Britain that a carrier could, by a special notice brought home to his customer, procure what, for organized companies engaged in transportation, must have been tantamount to an entire exemption from legal responsibility.² The sudden expansion of the steam railway system, with its humbler pioneer, the canal, as affording a new means of inland carriage, which must inevitably come to supersede, in a great measure, the old-fashioned stage-coach and carrier wagon, and give an impetus and bulk to local traffic such as former generations had never dreamed of, may largely account for this public concession; since charters were granted, about this period, in favor of large capitalists, to whom the courts and legislators showed themselves not a little obsequious. It is true that the English Carriers' Act of 1830 (of which we shall speak hereafter) professed in one section to keep carriers answerable for the felonious acts of their servants; but this provision was not forcibly expressed, while the act, as a whole, tended to the slackening of public policy with respect to the land-carrier vocation.³ Statutes of a much earlier date had likewise favored ship-owners, so as to permit of their reducing the legal carriage risks by sea, at the expense of their customers; not, however, without more cogent reason.⁴

While, therefore, one might now, under English sanction, stipulate as common carrier for obtaining special immunity against losses which the default or misconduct of those he

¹ See Carriers' Act, 11 Geo. IV. and 1 Will. IV. c. 68, cited *post*.

² *Hinton v. Dibbin*, 2 Q. B. 646; *Peek v. North Staffordshire R.*, 10 II L. 473, 494, and cases cited by Blackburn, J.; *Austin v. Manchester R.*, 10 C. B. 454; *Carr v. Lancashire R.*, 7 Ex. 707; *McManus v. Lancashire R.*, 2 II. & N. 693.

³ See Carriers' Act, cited *post*.

⁴ Acts 7 Geo. II. c. 15, and 26 Geo. III. c. 159, cited under Legislation, *post*; Angell Carriers, § 90.

employed in the course of his undertaking might occasion, we may well suppose that, for his own gross negligence, fraud, or misconduct, the common carrier still continued, by legal inference, chargeable. One, for instance, who performed the carriage in person, who drove his own wagon or rowed his own boat, or who loaded or unloaded with his own hands, would be debarred from justifying a loss happening under such circumstances of blame by setting up his special terms of exemption.¹ It was, of course, the carrier capitalist, and chiefly that fictitious personage, whose only hands are those of his servants, that reaped the chief advantage of the new exoneration. If a consignor agreed (as he sometimes would) that the incorporated company should not be responsible for any injury or damage to the goods, "however caused," the court pronounced him without remedy for a loss, no matter how just his complaint upon the facts of the case, against the officers and servants of the company.² And it became well understood that, whatever might have been the intention of those who framed the Carriers' Act, the act itself did not preclude the common carrier and his customer from entering into a special contract as to the conveyance of goods of any description or value, which should shift the legal risks practically from the former to the latter.³

¹ Story Bailm. § 549: *Brooke v. Pickwick*, 4 Bing. 218; *Lyon v. Mells*, 5 East, 428; *Batson v. Donovan*, 4 B. & Ald. 21; *Harris v. Packwood*, 3 Taunt. 261; *Beck v. Evans*, 16 East, 244. In *Wyld v. Pickford*, 8 M. & W. 443, 460, Parke, B., in commenting upon the expression "gross negligence," used in some of the foregoing cases as limiting the right of special-contract exemption, declared his belief that it really meant "ordinary negligence," or the want of such care as a prudent man would take of his own property; and that, notwithstanding a special notice of exemption, a carrier would be legally answerable for loss by misdelivery arising from an inadvertence or mistake on his part which might have been avoided by the exercise of ordinary care.

² *Hinton v. Dibbin*, and other cases cited, *supra*.

³ *Ib.* And see *Kelly, C. B.*, in *Baxendale v. Great Eastern R.*, L. R. 4 Q. B. 244, 255; *Chippendale v. Lancashire R.*, 7 E. L. & Eq. 395.

§ 451. **The same Subject; Railway and Canal Traffic Act of 1854; Later English Policy.** — This immunity from the acts of servants, and the special facilities thus afforded railway companies of escaping altogether the ancient restraints of policy, created profound dissatisfaction in the community. About the time *Hinton v. Dibbin*¹ was decided (which, however, was the case, not of a railway company, but of a carrier who employed drivers, and used on his route the old-fashioned vans drawn by horses), steam railways came into general use, easily supplanting other carriage rivals wherever they were extended. Managed with energy, endowed with capital, and retaining upon large fees the keenest legal talent of the land in their interests, these companies fought as carriers had never done before for the privilege of dealing with customers upon their own terms, and the insertion of such special conditions in freight contracts as should to the utmost increase their profits by reducing the legal risks to the lowest point. These carriers now claimed the same right of special contract exemption which the court had conceded to stage owners; and the right was accorded.² The judicial decisions which were riveting their shrewd policy so firmly, Parliament at length sought to neutralize by passing, in 1854, as to these and a leading class of inland competitors of inferior consequence, the Railway and Canal Traffic Act,³ whose provisions have since been extended by later legislation, so as to embrace steam vessels, and perhaps other classes of carriers.⁴

¹ 2 Q. B. 646 (A. D. 1842).

² See *Walker v. York & North Midland R.*, 2 E. & B. 750. A carrier (independently of statute) may stipulate against injuries to live-stock "howsoever caused," even though the loss was occasioned in fact by his own negligence. *Carr v. Lancashire R.*, 7 Ex. 707.

³ See Railway & Canal Traffic Act, 17 & 18 Vict. c. 31, cited under the head of Legislation affecting the carrier's responsibility, *post*.

⁴ Act 31 & 32 Vict. c. 119, § 16 (1868), cited *post*; *Cohen v. South-Eastern R.*, 1 Ex. D. 217. And see other legislation extending the provisions of the above act, referred to in *Doolan v. Midland R.*, 2 App. D. 792.

This act, from which the modern English policy as to carriers' contracts takes its departure, made all companies of the description mentioned therein liable generally for the neglect or default of the company or its servants; but with the equivocal reservation that such conditions might be imposed by the carrier as the court or judge before whom any such question was tried should adjudge to be "just and reasonable."¹ The precise legal application of this novel and seemingly variable test cannot yet be announced with confidence. Some of the judges naturally enough undertook at first to stultify Parliament, and keep the policy of the law unchanged, by granting that such companies could, notwithstanding the statute, stipulate by contract for their absolute and practical immunity as before;² but this attempt proved abortive.³ The lower courts of Great Britain appear latterly well agreed that very clear language must be used, in order that such carriers shall escape the usual obligations imposed by law.⁴ And as for that highest tribunal, the House of Lords, its purpose, to the high renown of that politico-legal assembly, has thus far been shown inflexible for sustaining the cause of Parliament and the public in respect of such transportation. Its decisions establish quite firmly in Great Britain that conditions,

¹ Railway & Canal Traffic Act, § 7, cited *post*.

² *McCawley v. Furness R.*, L. R. 8 Q. B. 57; and *Gallin v. London R.*, L. R. 10 Q. B. 212, which might seem to sanction this view, are not cases under the act, but relate strictly to passenger carriage.

³ See *M'Manus v. Lancashire R.*, 4 H. & N. 327; overruling *Wise v. Great Western R.*, 1 H. & N. 63. But see *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; s. c. in Ex. Ch. L. R. 9 Ex. 338.

⁴ A special contract expressing that goods are to be carried "at owner's sole risk," does not in terms absolve the company from damage occasioned by its unreasonable delay in transportation; and this, notwithstanding the goods were to be carried at less than the ordinary rate. *D'Arc v. London R.*, L. R. 9 C. P. 325. Cf. *Mitchell v. Lancashire R.*, L. R. 10 Q. B. 256; *supra*, § 450. Nor a contract that property shall be under a guard provided by the consignor, "the company accepting no responsibility;" provided the facts show that the loss arose wholly from the negligence of the carrier. *Martin v. Great Indian R.*, L. R. 3 Ex. 9.

made by any of the companies in question, which purpose gaining an absolute immunity from the default or negligence of its own servants, are unreasonable and void;¹ that the

¹ *Doolan v. Midland R.*, 2 App. D. 792 (1877); *Peek v. Staffordshire R.*, 10 H. L. 473. A stipulation against responsibility for goods insufficiently directed is pronounced "unjust and unreasonable" within the act. *Garton v. Bristol R.*, 1 Best & S. 112. So is a condition that the owner shall take all risks whatsoever for the conveyance of cattle; though a free ride be given the owner's servant, who travels with them, as an inducement to the contract. *Rooth v. North-Eastern R.*, L. R. 2 Ex. 173. Cf. *Chippendale v. Lancashire R.*, 7 E. L. & Eq. 395, decided prior to the passage of the act. So is a condition not to be liable "in any case" for loss or damage to an animal above a certain specified value, unless the value is declared. *Ashendon v. London R.*, 5 Ex. D. 190; overruling *Harrison v. London R.*, 2 B. & S. 122. So is a contract for absolute exemption from liability. *Gregory v. West Midland R.*, 2 H. & C. 944; *Gill v. Manchester R.*, L. R. 8 Q. B. 186.

But special limitations upon the time for presenting claims for damage, though allowing but a few days, are treated as "just and reasonable." *Lewis v. Great Western R.*, 5 H. & N. 867. Also, conditions against liability for other cause than gross negligence or fraud. *Beal v. South Devon R.*, 5 H. & N. 875, and 3 H. & C. 337. Also, exemption from damage for loss of market if delivered within a reasonable time after arrival. *Lord v. Midland R.*, L. R. 2 C. P. 339. And as to liability for loss arising from mere delay, see *Woodgate v. Great Western R.*, 51 L. T. 826. And see *Lewis v. Great Western R.*, 3 Q. B. D. 195, which exonerates from injury for improper packing, and sanctions, as reasonable, a condition of "owner's risk" limiting a company's liability to wilful misconduct. But it is doubtful whether the House of Lords would sustain this last case.

Here, however, was an issue of alternative rates; and the latest English cases (1882-83) certainly indicate a painful wavering of the courts as to the true purpose and policy of the Railway and Canal Traffic Act, where such rates are presented. Fish merchants in a memorable instance had their fish carried on alternative rates; but the condition imposed for carrying at the lower rate was to exonerate the carrier from "all liability for loss or damage." The lower court pronounced this "just and reasonable." Its decision was reversed on appeal, on the ground that such a condition practically absolved the carrier from all responsibility, inasmuch as the fish merchant had to send at lower rates in order to compete with others in his trade, and could not choose freely. But this decision was once more reversed in the House of Lords; whose final judgment announced that there was a *bona fide* option here given by

word "servants" in the act has a wide scope, extending to officers, agents, and sub-contractors employed by the company in doing its work, who might not be, literally speaking, its own "servants;"¹ and that the act requires that conditions such as the company may impose must be, not only in the opinion of a court or judge, "just and reasonable," as its language runs, but actually embodied (as another section provides) in a written contract, which is signed by the owner or sender of the goods.²

§ 452. **The same Subject.**—In cases of carriage not embraced under the Railway and Canal Traffic Act and its amendments,³ as where one carries freight by stage-coach or team in pursuance of a vocation which is left to common-law rules, the effect of a special contract still appears to be, as understood by the English courts, to exclude the relation of common carrier and public policy in the particular instance, and substitute that of a carrier who conveys under his special contract; in other words, the theory prior to 1854 still operates.⁴ Thus one who, in the course of a public vocation, carried furniture on the special undertaking to assume only the risk of breakage, and that to an amount not exceeding a specified sum on any one article, was recently held excusable from a loss by accidental fire.⁵ But the courts strongly disincline

the carrier, and that the alternative rates offered were fair enough. *Manchester R. v. Brown*, 8 App. Cas. 703, reversing 10 Q. B. D. 250, which reversed 9 Q. B. D. 230. One must conclude that the policy of the English act of 1854 has taken a new bend in the carrier's favor.

Any by-law of a railroad company which contravenes an act of Parliament is void. *Williams v. Great Western R.*, 10 Ex. 15.

¹ *Doolan v. Midland R.*, 2 App. D. 792. And see *Maclin v. London R.*, 2 Ex. 415.

² *Doolan v. Midland R.*, 2 App. D. 792; *Peek v. Staffordshire R.*, 10 H. L. 473.

³ See *supra*, § 451.

⁴ Following *Hinton v. Dibbin*, 2 Q. B. 616; *supra*, § 450.

⁵ *Scaife v. Farrant*, L. R. 3 Ex. 358. The fire was here without apparent negligence on the carrier's part, however.

to give doubtful language as to excepted risks such construction as would, on the footing of a mutual understanding, absolve the carrier from practical responsibility for the misconduct or culpable negligence of himself or his servants. Perils specially excepted by a ship-owner, for instance, under a bill of lading, have never, as it would appear, been stretched by inference so as to encourage personal or representative remissness.¹ And a stipulation "not to be accountable for leakage or breakage" is held not to exempt from a loss so occurring, but which is mainly occasioned by the carrier's own gross negligence.²

Perhaps, on the whole, the present tenor of the English decisions is to permit the common carrier (save so far as the legislation we have noted puts the curb upon railways, steam vessels, and other specified and chief classes of freight transporters³) to exclude, by special contract with his customer, all risk, except for one's own wilful misconduct and gross (or as some, with better regard for natural justice, have thought "ordinary") negligence; and, if the language of the particular contract be explicit enough, and sufficiently brought home to the customer himself, to avert the personal liability of the carrier for the negligence and misconduct of his servants and those he employs. The English courts show, however, at this stage of the law, a halting and facile disposition, and a variableness of opinion quite unfavorable to the deduction of general maxims in this respect.

§ 453. **American Doctrine of Contract Qualification.**—2. Now, to examine the American doctrine on this point. In this country, the course of decision has been far more conservative, consistent, and uniform than in England. We find

¹ *Supra*, § 416, and notes; *Grill v. Collier Co.*, L. R. 3 C. P. 476; *Taylor v. Liverpool Steam Co.*, L. R. 9 Q. B. 546; *Czech v. General Steam Nav. Co.*, L. R. 3 C. P. 14.

² *Phillips v. Clark*, 2 C. B. N. S. 156. See *Ohrloff v. Briscall*, L. R. 1 P. C. 231.

³ *Supra*, § 451.

no judicial eccentricity manifested in dealing with the rights of companies organized for carriage of freight that legislatures have felt called upon to correct; but the whole treatment of this special contract question by American courts with reference to the policy of the law appears, on the whole, prudent, sensible, and worthy of public gratitude. In view, certainly, of the local independence of so many jurisdictions, and of the conflict and diversity of State interests in our modern land and water transportation, the uniform steadiness with which American courts have continued to hold common carriers to their fundamental obligations in dealing with the individual customer, despite English example and a corporate pressure no less forcible, is quite remarkable.

In the New York courts, which, first of American tribunals, appear to have been gravely confronted by this special-contract subject, it was early declared, with emphasis, that public policy could not be warped in any such manner to the public servants' interests. Common carriers, it was held, might, agreeably to some notice brought home to a particular customer, require the nature and value of the property to be stated, and for that purpose make a special acceptance; but they could not by special acceptance limit their common-law responsibility for what was intrusted them for transportation.¹ This, however, antedates the period of railways and inland carriage expansion; and the current soon set so strongly in favor of countenancing such a fair relaxation of the ancient rule as the bailment parties might themselves mutually permit, that this extreme doctrine was afterwards abandoned.² Shortly before the middle of this century the Supreme Court of the United States, in a well-considered case, brought up to

¹ Story Bailm. § 554, and note; *Cole v. Goodwin*, 19 Wend. 251; *Pardee v. Drew*, 25 Wend. 459. And see *Gould v. Hill*, 2 Hill, 623; *Angell Carriers*, § 221.

² See *Alexander v. Greene*, 3 Hill, 9; reversed, 7 Hill, 533; *Dorr v. Steam Nav. Co.*, 4 Sandf. 136; 1 Kern. 485.

test the question fully, pronounced the carrier's right to qualify his risks, to a fitting extent and under fitting circumstances, an undeniable one;¹ and this, throughout the Union, was fairly accepted as conclusive of the doctrine.

§ 454. **The same Subject.** — If our State courts, whose function it is to deal more intimately with local controversies of this character, have since abandoned the shore, and gone swimming down stream and apart, they nevertheless go, thus far, holding the consignor's cause in their teeth. And, furthermore, the indications are that they have touched bottom, so as firmly to rest upon these quite consistent conclusions: 1. That common carriers may, by special agreement, stipulate for a less degree of responsibility than the common law imposes; and this, apparently, to the extent of making them, in effect, no longer what public policy once declared them, extraordinary bailees, who are invested with extraordinary risks, but, what they would otherwise have been, ordinary bailees for hire, bound to the exercise of honest good faith and ordinary diligence.² 2. But, on the other hand, that for the culpable negligence, fraud, or misconduct of himself or his servants, subordinates, and sub-contractors, the common carrier continues answerable in law, notwithstanding any special stipulations to the contrary, which he may have procured from his customer; this meaning, as we conceive, not gross but ordinary negligence, as in the case of other hired bailees, besides fraud or misconduct.

¹ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344 (Jan. Term, 1848).

² *Slocum v. Fairchild*, 7 Hill, 292; *Wells v. Steam Nav. Co.*, 4 Seld. 375; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Camp v. Hartford Steamboat Co.*, 43 Conn. 333; *Squire v. New York Central R.*, 98 Mass. 239; *Sager v. Portsmouth R.*, 31 Me. 228; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304; *Davidson v. Graham*, 2 Ohio St. 131; 4 Ohio St. 362; *Field v. Chicago R.*, 71 Ill. 458; *Camden R. v. Baldauf*, 16 Penn. St. 67; *Powell v. Pennsylvania R.*, 32 Penn. St. 414; *Michigan Central R. v. Hale*, 6 Mich. 243; *Hooper v. Wells*, 27 Cal. 11; *Rice v. Kansas Pacific R.*, 63 Mo. 314; *York Co. v. Central R.*, 3 Wall. 107; *Swindler v. Hilliard*, 2 Rich. 286; *Boorman v. American Express Co.*, 21 Wis. 152.

In fact, the public carrier may become a private carrier, or mutual-benefit bailee of the ordinary sort, by special contract; and here the right to transcend the safeguards of public policy ceases.¹ 3. If the carrier gives a lower rate of recompense, quicker transportation, or some other genuine consideration to the customer in return for a reduction of his legal risks, more especially should his special stipulation receive favor.²

What we may style, then, the settled American doctrine, so far as any legal doctrine may be pronounced settled, concerning the special-contract capacity of common carriers of goods, finds, apparently, English confirmation, not only in the judicial opinion of one so eminent as Baron Parke,³ but in a passage contained in that earliest of English text-books, “The Doctor and Student,” which a century later Attorney-General Noy embodied among his legal Maxims.⁴ Nor do the American

¹ *Railroad Co. v. Lockwood*, 17 Wall. 357, and many cases cited; *Reno v. Hogan*, 12 B. Mon. 63; *Union Express Co. v. Graham*, 26 Ohio St. 595; *Snider v. Adams Express Co.*, 63 Mo. 376; *Mann v. Birchard*, 40 Vt. 326; *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Christenson v. American Express Co.*, 15 Minn. 270.

² *Dillard v. Louisville R.*, 2 Lea, 288.

To quote from the opinion pronounced in the first New York case which conformed the rule of that State to the decisive, and somewhat antagonizing utterance of the Federal supreme bench, and thus interpreted it: “A common carrier has in truth two distinct liabilities, the one for losses by accident or mistake, where he is liable, by the custom of the realm or the common law, as an insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. It would certainly seem but reasonable that he might, by express special contract, restrict his liability as insurer, that he might protect himself against misfortune, even though public policy should require that he should not be permitted to stipulate for impunity where the loss occurs from his own default or neglect of duty.” *Dorr v. New Jersey Steam Nav. Co.*, 4 Sandf. 136, 145 (1850), per Campbell, J. And see Mr. Justice Field in *York Co. v. Central R.*, 3 Wall. 107.

³ *Wylde v. Pickford*, 8 M. & W. 443, cited, *supra*, § 450 n.

⁴ *Doct. & Stud.* 2, c. 38; *Noy Maxims*, 92. This passage in the former book runs as follows: “If he” [the common carrier] “would percase refuse to carry it” [the thing delivered for carriage] “unless promise were made unto him that he shall not be charged for no misdemeanor that

courts distinguish among common carriers in this respect; to individuals, partners, and companies alike, the rule is applied.¹

§ 455. **The same Subject; Latest Decisions; Rule as to Servants.** — Our latest decisions, while, on the whole, confirming the foregoing statement, betray an uneasy and doubtful disposition. In various instances, the negligence of the carrier and his servants is held inexcusable, whatever special conditions may have accompanied the bailment; the court not clearly defining, however, whether by this was meant gross or ordinary negligence.² Moreover, the supreme federal tribunal, as umpire among discordant States, has recently pronounced in favor of the carrier's right to stipulate for a fixed valuation of what he carries, which, if reasonable, shall conclude the customer, though loss should occur through the carrier's carelessness.³ A few States, we may add, hold the standard with a feeble grasp.⁴ It may yet be desirable, therefore, for our State legislatures and Congress, each within its proper sphere of jurisdiction, to aid by written law the fluctuating rule of public policy.

should be in him, the promise were void, for it were against reason and against good manners, and so it is in all other cases like." Note the effect of special contract in the other bailments, *supra*, § 20.

¹ The opinion pronounced by Mr. Justice Bradley, in *Railroad Co. v. Lockwood*, 17 Wall. 357, is replete with learning, and shows an abundant research of the authorities on this whole subject; though the disposition he manifests to interchange carriage of goods and carriage of passengers, as topics turning upon the same precedents, should not escape criticism.

² *Railroad Co. v. Lockwood*, 17 Wall. 357, is opposed to the New York rule to which the courts of that State still nominally adhere. See 97 N. Y. 87; *Mynard v. Syracuse R.*, 71 N. Y. 180. But the influence of the latest decisions in that State is against exempting a carrier from liability for his own negligence by refusing to construe the contract as intending in terms any such exemption. *Nicholas v. N. Y. Central R.*, 89 N. Y. 370; 71 N. Y. 180; *Holsapple v. Rome R.*, 86 N. Y. 275.

³ *Hart v. Pennsylvania R.*, 112 U. S. 331, and cases cited.

⁴ See § 479, *post*, as to the carriage of animals.

Nor should we fail to observe, on the other hand, that the exceptional liability of one exercising a public vocation for the acts of those whom he employs has never been clearly and positively defined. Our natural inference is that for the negligence and misconduct of his servants the carrier in this country must answer as for his own;¹ that he cannot by the better opinion be permitted to absolve himself from a loss which either he or they directly occasioned;² and that the usual limitations of agency or service as between negligence and a positive wrong committed by the servant do not here avail.³

§ 456. **American Rule; Permitted Qualifications by Contract; Fire; Loss by Mobs, etc.** — In pursuance of this theory of responsibility, it has become a well-settled American rule, that a common carrier may, by actual express contract to that effect, clearly made, divest himself of all responsibility for loss of his consignor's goods by any fire happening without his own fault.⁴ But he cannot thus secure exemption from damage or loss by a fire which the negligence or misconduct of himself or his servants occasioned.⁵ So, too, a special exemption may

¹ See *supra*, §§ 429, 430.

² *Medfield v. Boston, &c. R.*, 102 Mass. 552; *Shriver v. Sioux City R.*, 24 Minn. 506. *Higgins v. New Orleans R.*, 28 La. Ann. 133, *contra*, favors stipulations of the carrier against the fraud and misconduct of his servants. And see 97 N. Y. 87.

³ If this proposition be true, embezzlement by the carrier's servant cannot be excused by the carrier, under his special contract, on the plea that he was careful in employing the servant. Contrast with this the ordinary bailee for hire; *supra*, § 108.

⁴ *York Co. v. Central R.*, 3 Wall. 107; *Germania Fire Ins. Co. v. Memphis R.*, 72 N. Y. 90; *Pemberton Co. v. New York Central R.*, 104 Mass. 144; *Grace v. Adams*, 100 Mass. 505; *Swindler v. Hilliard*, 2 Rich. 286. See *The Iddo Kimball*, 8 Ben. 297; *Rand v. Merchants Despatch Co.*, 59 N. H. 363. Such exemption from fire will avail the carrier, if without his fault the goods are burned by a mob. *Wertheimer v. Penn. R.*, 17 Blatchf. 421.

⁵ *Bank of Kentucky v. Adams Express Co.*, 93 U. S. Supr. 174; *Steinweg v. Erie R.*, 43 N. Y. 123; *Hibler v. McCartney*, 31 Ala. 501; *Powell v. Penn. R.*, 32 Penn. St. 414; *Erie R. v. Lockwood*, 28 Ohio St. 358; *Michigan Central R. v. Hale*, 6 Mich. 243; *Empire Trans. Co. v.*

properly be secured by the carrier against losses by "breakage," "leakage," "damage by rats," and the like; but not, again, to the extent of discharging legal liability for such a loss, when produced by the negligence of the carrier and his servants, or by his or their other plain breach of duty.¹ The same rule, with its reservations, will hold true of special stipulations against damage of sea or river, and losses by unavoidable accident, by thieves, mobs, riots, and the like;² and of special acceptances to carry only to a certain point, and then forward by another conveyance.³ On the main principle thus indicated, no general stipulation against liability for loss "from whatever cause arising" can carry the sweeping force of an absolute immunity from bailment responsibility.⁴ But the carrier may provide, by special agreement, against all accountability, save for the negligence or misconduct of himself and his agents; or, in other words, cast off the capacity of insurer completely.⁵

As with risks from which the law, of itself, exempts the carrier, so as concerns those which are specially excused by contract, there is no liability incurred for a loss due proximately and primarily to the excepted risk, even though the carrier's negligence may have remotely contributed thereto, by exposing the goods to the peril.⁶

Wamsutta Oil Co., 63 Penn. St. 14; 18 Fed. R. 318; *Little Rock R. v. Talbot*, 39 Ark. 523; *Louisville R. v. Brownlee*, 14 Bush, 590. So, too, where the exemption was against damage by "fire or water;" and cotton was carelessly carried in open cars and burned in consequence. *New Orleans R. v. Faler*, 58 Miss. 911; *Chicago R. v. Moss*, 60 Miss. 1003.

¹ *Reno v. Hogan*, 12 B. Monr. 63; *Sager v. Portsmouth R.*, 31 Me. 228; *The Isabella*, 8 Ben. 139; *The America*, 8 Ben. 491.

² See *Davidson v. Graham*, 2 Ohio St. 131; 4 Ohio St. 362; *supra*, § 116, *n.*; (*Tenn.*) 1 S. W. 102.

³ See *Reed v. U. S. Exp. Co.*, 48 N. Y. 462; *Snider v. Adams Express Co.*, 63 Mo. 377; *Field v. Chicago R.*, 71 Ill. 458.

⁴ *Mynard v. Syracuse R.*, 71 N. Y. 180; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Sager v. Portsmouth R.*, 31 Me. 228; (*Minn.*) 31 N. W. 519.

⁵ See *Camp v. Hartford Steamboat Co.*, 43 Conn. 333.

⁶ *Hoadley v. Northern Trans. Co.*, 115 Mass. 304. See *supra*, § 438;

§ 457. **Contract for Valuation ; as to Time of presenting Claims, etc.** — The carrier may state a reasonable limit to the sum for which he shall be held accountable in case of any loss ; but he cannot, where this sum is understood to be an under-valuation of the goods, thereby evade his full accountability as an ordinary bailee.¹ Upon this point State decisions have been somewhat at variance, but the better authority decidedly favors the carrier's right to protect himself against arbitrary valuations even where his own negligence may have occasioned the loss.²

Magnin v. Dinsmore, 70 N. Y. 410; *Railroad Co. v. Reeves*, 10 Wall. 176. And see *Pemberton Co. v. New York Central R.*, 104 Mass. 144, where his tight packing into a car which caught fire was held no conclusive denial of the carrier's right of exemption; fire being made, by his contract, an excepted peril.

Where an express company contracts for liability only as "forwarder," this does not exclude liability for culpable negligence or misconduct in a common-carrier capacity. *Hooper v. Wells*, 27 Cal. 11; *Christenson v. American Express Co.*, 15 Minn. 270; 4 McArthur, 124.

¹ *United States Express Co. v. Backman*, 28 Ohio St. 144; *Belger v. Dinsmore*, 51 N. Y. 166. And see *Boorman v. American Express Co.*, 21 Wis. 152; *Squire v. New York Central R.*, 98 Mass. 239; *South Alabama R. v. Henlein*, 52 Ala. 606; *Westcott v. Fargo*, 61 N. Y. 542; *Magnin v. Dinsmore*, 62 N. Y. 35; *Harvey v. Terre Haute R.*, 74 Mo. 538.

² See the recent case of *Hart v. Pennsylvania R.*, 112 U. S. 331, approving the rule of Massachusetts, New York, Illinois, Pennsylvania, and Missouri, in this respect, and disapproving that of Ohio, Mississippi, Wisconsin, Kansas, and Minnesota. Where a contract is fairly made with a railroad carrier (observes Mr. Justice Blatchford with becoming caution), agreeing on a valuation of the property carried, based on the condition that the carrier assumes liability only to the extent of the agreed valuation, the contract will be upheld, even though loss should occur by the carrier's negligence, as a proper and lawful mode of securing a due proportion between the amount for which the carrier is responsible, and the freight he receives, and of protecting himself against extravagant and fanciful valuations. In this case, horses were transported at a fair assumed value of \$200 each; and because one was killed by the carrier's fault the shipper claimed to recover \$15,000 as his real worth.

This same principle was lately applied (without reference to the above case) in *Graves v. Lake Shore R.*, 137 Mass. 33, where wine was transported at an agreed valuation of \$20 per barrel. And see *Rosenfeld v. Peoria R.*, 2 N. E. Rep. 341. *Contra*, 55 Wis. 713; 30 Kan. 645; 60 Miss.

Reasonable stipulations as to the time and method of presenting one's claim for loss or damage, against the carrier, may also be made so as to bind the customer;¹ but to utterly exclude thereby the consignee's fair opportunity of inspecting the property upon its arrival, ascertaining the extent of damage, if any, and so making his claim known to the carrier, or his proper representative, is not allowable.²

§ 458. **Miscellaneous Qualifications by Special Contract.** — A special contract may give the carrier an option as between modes of transportation.³ Or a right to jettison cattle shipped on deck, should the safety of the ship require it.⁴ Or the benefit, in case of loss, of any insurance taken out by the customer.⁵ Or the right to ship "at convenience;" not meaning, however,

1017; 71 Ala. 611; 31 Minn. 85. So is it as to stipulations which restrain liability to the invoice value of goods carried by bill of lading. 18 Fed. R. 459. And see 29 Fed. R. 399.

The limitation contained in an express receipt of \$50 for loss or damage "of any box, package, or thing" unless the true value was inserted, permits the shipper of three packages to recover at least \$50 for each package. 93 Ill. 523. Such limitations are to be fairly construed. 63 Wis. 93.

¹ Express Co. v. Caldwell, 21 Wall. 264, sustains an agreement that the company shall not be held liable for loss of property unless claim be presented within ninety days after its delivery to the company; the transit occupying only about a day. *Contra*, Southern Express Co. v. Caperton, 44 Ala. 101, here commented upon. And see Southern Express Co. v. Hunnicutt, 54 Miss. 566; United States Express Co. v. Harris, 51 Ind. 127; Westcott v. Fargo, 61 N. Y. 542; 67 How. Pr. 103. Such limitations should be reasonably interpreted. 51 N. Y. Super. 196. See also (Tenn.) 1 S. W. 102.

² Rice v. Kansas Pacific R., 63 Mo. 314; Adams Express Co. v. Reagan, 29 Ind. 21; Capehart v. Seaboard R., 77 N. C. 355; Porter v. Southern Express Co., 4 S. C. n. s. 135; Memphis R. v. Holloway, 9 Baxt. 188. The foregoing is held to be a limitation rather than a condition, which must be specially pleaded. Westcott v. Fargo, *supra*.

³ And if so, the option must be exercised with fair regard to the owner's interest. Blitz v. Union S. S. Co., 51 Mich. 558.

⁴ The Enrique, 5 Hughes, 275.

⁵ Rintoul v. N. Y. Central R., 17 Fed. R. 905; British Ins. Co. v. Gulf R., 63 Tex. 475.

with wholly unreasonable delay.¹ For stipulations like these are not deemed unreasonable or obnoxious to the public interests, nor should they be so interpreted.

§ 459. **Carrier's Enlargement of Risk by Special Contract.** — The carrier's intention to enlarge, by special contract, his legal risk as insurer, so as to make his responsibility absolute, or to indemnify against an excepted peril, will, of course, be respected whenever this is manifest; but a contract of this sort is so out of course and so disadvantageous to himself, that, unless some special consideration appear for such extreme indulgence to a particular customer, a binding agreement to this effect is not inferable from the carrier's bare promise to do more than the law demands.² Even a special contract on the carrier's part to carry "safely and securely" will not readily be construed into a more onerous undertaking than to perform his general duty as the law and public policy require.³ Nor is his qualified engagement to carry by a particular train or boat or on a certain day to be presumed an absolute one, regardless of perils and accidents which he cannot control.⁴

§ 460. **How Special Contract with Carrier is made.** — We next ask in what manner a special contract which seeks to

¹ *Branch v. Wilmington R.*, 88 N. C. 573.

See, further, *Green v. Boston R.*, 128 Mass. 221; *Overland Mail Co. v. Carroll*, 7 Col. 43.

² *Fenwick v. Schmalz*, L. R. 3 C. P. 313; *Railroad Co. v. Reeves*, 10 Wall. 176. See also *Nelson v. Woodruff*, 1 Black, 156; *Tarbox v. Eastern Steamboat Co.*, 50 Me. 339; *Knowles v. Dabney*, 105 Mass. 437; *Tierney v. New York Central R.*, 17 N. Y. Supr. 569; *The Harriman*, 9 Wall. 161; *Harmony v. Bingham*, 2 Kern. 99.

³ *Shaw v. York R.*, 13 Q. B. 347. But see *Story Bailm.* § 33; *Coggs v. Bernard*, 2 Ld. Raym. 909, 911; *Kettle v. Bromsall*, Willes, 118. A carrier who agrees to carry through without change of cars is bound accordingly, and endangers his special qualifications of risk if he does otherwise. *Stewart v. Despatch Co.*, 47 Iowa, 229.

⁴ See *Hawes v. South Eastern R.*, 54 L. J. Q. B. 174, where the engagement to carry fish by a special train and boat was "wind, weather, and tide permitting," and bad weather made such transit impossible.

qualify the carrier's common-law liability may be entered into. Were it customary for modern carriers to go strictly by public policy in their charges, and at the same time to ask each shipper, as a personal favor, to sign off deliberately in advance his legal rights, special carriage contracts would be few, and litigation under this head quite infrequent. But the practice of this busy century shows the bailor's real position by no means so advantageous in such transactions as ancient wisdom designed it should be. Ship-owners, stage-coach proprietors, transporters by steam, expresses, common carriers in general, more especially those with great capital, push unceasingly for that practical immunity which the common law denied them ; and, as one important means to this end, most of them seek to establish, wherever they can, a constructive assent on the part of customers to special terms which they alone have put forward ; and so gain, by indirection, concessions that by open proposal, while affording free opportunity for assent or rejection, they could not hope to procure.

The reports bear ample record of the unflagging perseverance with which the common carrier seeks to make decreased responsibility to the public the price of affording to the public increased facilities of transportation ; of his quick-wittedness in coaxing, entrapping, even coercing his customers into accomplishing the furtherance of his own ends ; and of his constant disposition to promulgate rules concerning freight, for whose successful enforcement he calculates upon the natural disposition of men to put up with a small exaction from those whose service is indispensable, rather than take the initiative in carrying on a petty litigation and provoking a dangerous enmity for the sake of asserting a principle.

§ 461. **The same Subject ; Former Practice of giving Notices.** — Of all special carriage contracts, mutual assent is a necessary ingredient, certainly in theory. But formal stipulations of this kind, proposed and duly assented to, come rarely before our courts ; but it is the indirect agreement, the consignor's

assent by inference to his carrier's proposition, which they have chiefly to pass upon. It became common in the latter part of the eighteenth century for inland carriers to post and distribute notices which announced express conditions and limitations of responsibility on their part; so that whosoever might employ the transportation service without objection was chargeable, as the carrier could claim, with knowledge of these express conditions, and a tacit consent to abide by them. In Great Britain the practice of giving notice had prevailed long before the courts gave decision upon the validity of making such limitations; and by Lord Ellenborough's time, and at the opening of this century, the general right of the carrier to thus limit his risks became clearly conceded in Westminster Hall.¹ The courts of our foremost American States, confining themselves to a recognition of the common law as interpreted prior to the separation of the American Colonies from the mother country, were long reluctant to concede so loose a practice, but they yielded somewhat to pressure in the same direction.²

We are to note a fluctuation of judicial opinion, not, however, by the same wave line in England as in America; nor, indeed, so as to keep different quarters of the United States in full accord on the general doctrine. Best, C. J., one of the ablest English defenders of the carrier's right of express limitation by notice, has laid stress on the immense risks which attend the modern business, whereby the loss of a

¹ *Nicholson v. Willan*, 5 East, 507 (1804). It is said that the doctrine of notice was not known to the courts prior to the case of *Forward v. Pittard*, 1 T. R. 27 (*i.e.* about the year 1785). *Burrough, J.*, in *Smith v. Horne*, 8 Taunt. 144. And see *Story Bailm.* §§ 551, 553.

² *Hollister v. Nowlen*, 19 Wend. 234, where the English cases are reviewed; *Cole v. Goodwin*, 19 Wend. 251; *Angell Carriers*, § 232 *et seq.*; *Fish v. Chapman*, 2 Kelly (Ga.), 349; *Jones v. Voorhees*, 10 Ohio, 145; *Atwood v. Reliance Trans. Co.*, 9 Watts, 87. But see *Dwight v. Brewster*, 1 Pick. 50; *Beckman v. Shouse*, 5 Rawle, 179; *Bingham v. Rogers*, 6 W. & S. 495.

single package might ruin the bailee, as a circumstance to justify him in giving general warning that, unless specially compensated for his care and trouble, he will not hold himself liable beyond a certain sum.¹ But the English courts did not stop here; for, as we have seen, they came from permitting his limitation of value to granting him the right to procure unjust and unreasonable contract exemptions;² and when the right of casting off the public responsibilities was once found to depend, in actual practice, not upon the clear and indisputable permission of the customer himself, but upon the issue or publication by the carrier of some card, circular, poster, or advertisement, to which no more than one's tacit assent was expected in return, the situation of the public was seen to be intolerable.³ Hence, the English Railway and Canal Traffic Act of 1854 (17 & 18 Viet. c. 31) required that the conditions "just and reasonable" should be embodied in a special contract in writing, signed by the owner or sender of the goods.⁴

¹ *Riley v. Horne*, 5 Bing. 217. And see *Story Bailm.* § 556.

² *Supra*, § 450.

³ See *Maving v. Todd*, 1 Stark. 72, 79; *Leeson v. Holt*, 1 Stark. 186; *Clark v. Gray*, 4 Esp. 177; *Walker v. York & North Midland R.*, 2 E. & B. 750; *Peek v. North Staffordshire R.*, 10 H. L. 473, 494, and earlier cases reviewed therein by Blackburn, J., concerning carriers' notices previous to 1830. The extravagance of the English cases is strikingly presented in 1 Bell Com. 382, which Angell Carriers, § 234, quotes. It was believed by many that the Carriers' Act of 1830 (11 Geo. IV. & 1 Will. IV. c. 68) would control in some measure the effect of such notices; see *Story Bailm.* § 554; but experience proved otherwise.

⁴ See *supra*, § 451; *Peek v. North Staffordshire R.*, 10 H. L. 473; *Doolan v. Midland R.*, 2 App. Cas. 792. Though such common carriers had, to a large extent, sought exemption by giving bills of lading, tickets, receipts, and the like, to the sender or owner, or by means of some more general notice, and they had asked no writing or token of assent in return, the fairer method was sometimes employed of procuring the sender's signature to a memorandum or ticket stating the terms. See, *e.g.*, *Austin v. Manchester R.*, 16 Q. B. 600; *Great Northern R. v. Morville*, 21 L. J. Q. B. 319. This signed memorandum had, of course, the effect of a special contract.

§ 462. **The same Subject; Present English Rule.** — Nothing better shows how completely the English carrier companies had previously outgeneralled the public in the course of half a century's warfare than a prominent case, decided shortly before the above act was passed, and which doubtless influenced its passage. A railway company distributed printed circulars among fish-dealers, announcing that it would transport fish only upon condition of its absolute exemption from carrier liability. The fish-dealers angrily tore up the notices; and one recipient of a circular sent his fish through as though in defiance of such terms. But the courts held (the carrier company's legal right to stipulate for such absolute exemption having been previously adjudicated in his favor) that the customer's intended dissent could not avail; for if, after being served with the notice, he insisted on sending his fish, he must be taken as bound by the terms of the notice.¹ It was a relief to the public when the Railway and Canal Traffic Act of 1854 cut away this pretence of a mutual agreement.²

Consistency still keeps the English courts swerved to the carrier's side in the cases of public notice to which legislation of the above character does not extend. And a customer who has been served with a general notice that the carriage will be upon conditions contained in other documents has been held chargeable accordingly; so that the means of ascertaining a certain condition may sometimes bind the consignor to that condition, without his actual knowledge thereof.³ And yet the principle of mutual assent is so far upheld that, where one who could not see to read was induced to sign a special contract under the misrepresentation that his signature was a

¹ Walker v. York & North Midland R., 2 E. & B. 750.

² See § 461. The policy of this act has, as we have already observed, been since extended to steamships, etc. *Supra*, § 452; Act 31 & 32 Vict. c. 119, § 16 (1868).

³ Stewart v. London R., 3 H. & C. 135. See also Phillips v. Edwards, 3 H. & N. 813.

mere matter of form and of no consequence, the special contract was pronounced invalid.¹

§ 463. **American Rule; General Notices not favored; Mutual Assent.**—The better nerve of our American tribunals, in keeping the curb rein steady which holds the carrier to his public obligations, has rendered judicial laxity concerning methods of special contract much less injurious. Nor even in this latter respect, closely as many States have approached the English doctrine of notice, are mere public notices, as by the carrier's general advertisement or posters, favored in this country to the extent of enabling the public transporter to limit his legal responsibility by such means alone. Even a

¹ *Simons v. Great Western R.*, 2 C. B. N. s. 620; *Gibbon v. Paynton*, 4 Burr. 2302; *Kerr v. Willan*, 2 Stark. 53; *Story Bailm.* § 558. And see, as to distributed handbills, *Palmer v. Grand Junction R.*, 4 M. & W. 749.

Where two or more inconsistent notices were given, the carrier was deemed bound by that least beneficial to himself. *Munn v. Baker*, 2 Stark. 255; *Story Bailm.* § 558. But see *Phillips v. Edwards*, 3 H. & N. 813. And he could waive his notice in favor of any customer he might select. *Story Bailm.* §§ 558, 572; *Marsh v. Horne*, 5 B. & C. 322; *Helsby v. Mears*, 5 B. & C. 504.

This doctrine of notice bears largely upon the rule of mutual assent, where bills of lading, receipts, tickets, and other memoranda containing written or printed qualifications of liability are habitually given by the carrier to his several customers.

Judge Story has set forth at much length the English doctrine of notices, as expounded in the early part of the present century. *Story Bailm.* §§ 553–573. His lucid statements are worthy of the student's careful perusal, though, ere this, the subject has lost its prestige. The courts appear to have considered that the carrier's mere advertisement of the terms of his responsibility could not take effect unless brought home in some way to the customer's knowledge. But as this knowledge might be constructive as well as direct, much uncertainty existed in practice. A foundation for presuming such knowledge might be laid, as by showing that the notice was printed in a newspaper which the party habitually read. *Leeson v. Holt*, 1 Stark. 186; *Story Bailm.* §§ 557, 558. But a notice posted at the termini could not of itself affect persons who delivered goods at intermediate points. *Gouger v. Jolly, Holt*, N. P. 317; *Clayton v. Hunt*, 3 Camp. 27. And in general, posting a public notice at the carrier's place of business was a fact inconclusive.

public notice brought directly to the knowledge of the owner or sender of the goods has, in several cases before the appellate courts of different States, been treated as ineffectual.¹ And our general rule is to require, at all events, some evidence, *aliunde*, of the owner's assent to the qualified liability which the carrier thereby seeks to impose upon him.²

But in America, as in England, saving legislative restrictions on this point, the common carrier may qualify his bailment responsibility within such limits as may be lawful, by any express contract, oral or written.³ If the owner's or sender's assent appear in writing, all the better; yet this is by no means indispensable to the validity of that stipulated exemption which bears the genuine stamp of mutual assent. The special contract should not be with one legally disqualified; and if with a consigning party who is blind, deaf, ignorant of writing, or unacquainted with the language, the carrier must take good heed not to impose unfairly upon his understanding.⁴ In some States railways, and perhaps other classes of carriers, are compelled, as in England, to make express contracts with the shipper.⁵ And where fraud or mistake is absent, the customer who signs a written contract for transporting his goods is, on general principle, bound by its terms, and cannot set up oral stipulations to vary or defeat it.⁶

¹ *Kimball v. Rutland & Burlington R.*, 26 Vt. 247; *Jones v. Voorhees*, 10 Ohio, 145.

² *Ib.*; *Dorr v. New Jersey Steam Nav. Co.*, 1 Kern. 485; *Blossom v. Dodd*, 43 N. Y. 264; *Bigelow, C. J.*, in *Judson v. Western R.*, 6 Allen, 486, 490; *Michigan Central R. v. Hale*, 6 Mich. 243; *Davidson v. Graham*, 2 Ohio St. 131; *Moses v. Boston & Maine R.*, 4 Fost. 71; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Cantling v. Hannibal R.*, 54 Mo. 385.

³ *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Michigan Central R. v. Hale*, 6 Mich. 243.

⁴ *Camden R. v. Baldauf*, 16 Penn. St. 67. And see, for English authority to the same purport, *Simons v. Great Western R.*, 2 C. B. N. s. 620.

⁵ *Georgia R. v. Gann*, 68 Ga. 350.

⁶ *St. Louis R. v. Cleary*, 77 Mo. 634.

§ 464. **Mutual Assent in Bills of Lading and Similar Documents.**—The English practice of giving public notice of the intent to transport under a qualified liability appears to have originated with land-carriers, who always found better opportunities to pursue it than carriers by water. The latter class early adopted a more positive and appropriate means of curtailing their public risks, by stating the special exceptions they meant to ~~claim~~ in the bill of lading, a document universally recognized by commercial countries in shipments of personal property by water, and given in each individual transaction. This bill of lading, which has usually been made out in triplicate for the convenience of all parties concerned, serves as the written evidence of a contract with the particular customer for carrying his goods by sea for a certain compensation called freight; it is signed by the captain, master, or other agent of the vessel; it specifies the receipt of specified chattels; and, in effect, promises their transportation on the terms therein expressed, followed by their delivery at the place appointed to the consignee or his assigns, he or they paying freight for the same. It is assignable by indorsement, so as to afford a ready means of transferring property and possessory title to the goods represented; and, as its verbal tenor shows, this instrument partakes of two distinct characters,—that of a written contract, and that of a written receipt.¹ Now, the insertion of special conditions of carriage in documents like these was natural enough, from the moment it became likely that a sea-carrier's special terms or special acceptance would bind his customer by indirection at all. And, beginning with that very moderate

¹ See *Abbott Shipp.* 321-323; *Mason v. Lickbarrow*, 1 H. Bl. 357, per Lord Loughborough, 2 T. R. 607; 1 *Pars. Shipping*, 184 *et seq.*; *Sears v. Wingate*, 3 Allen, 103; *The Keokuk*, 9 Wall. 517; *Pollard v. Vinton*, 15 Otto, 7. In *The Delaware*, 14 Wall. 579, 600, Mr. Justice Clifford observes: "Beyond all doubt, a bill of lading, in the usual form, is a receipt for the quantity of goods shipped, and a promise to transport and deliver the same as therein stipulated." And see *post*, §§ 475-477.

and reasonable exception of "perils of the seas," ship-owners came gradually to multiplying their special conditions of exemption, until, at the present day, bills of lading, unlike those in common use when Abbott and Story wrote their respective text-books,¹ call frequently for judicial interpretation.²

That silently receiving a bill of lading for carriage by ocean or in our inland waters imports an assent, on the shipper's part, to be bound by any and all special and permissible qualifications which may prove to be therein contained, is not, as a rule, to be denied.³ And since general notices have fallen into disrepute, railways and other inland carriers are latterly drawn into the extensive use of corresponding instruments for similar purposes of carriage and carriage exemption. Conditions inserted in documents like these are more readily brought home to the knowledge of consignors and owners than those promulgated by general notice, and hence obtain the judicial sanction more readily; while, on the other hand, the carrier keeps the advantage he has so much craved, of securing the customer's assent by indirection or his mere non-objection, if only the courts will extend to inland traffic the time-honored favor accorded to bills of lading where the transportation is by water.

§ 465. **Indirect Mutual Assent in Modern Cases; the Decisions reconciled.**—This widely prevalent use, in modern transportation, of inland bills of lading, receipts, and tickets, written or printed, which the carrier alone issues, so that the consignor need sign nothing and say nothing, but find from inspection, if he cares to read the document, that the other party

¹ Judge Story reiterates the assertion contained in Abbott on Shipping, pt. 3, c. 4, § 1, 5th ed., that the terms of the exception in the modern bill of lading in England had given rise to but one judicial decision. Story Bailm. § 552.

² See *supra*, § 416 and *n.*, where the leading exceptions under our modern bills of lading are set forth at length.

³ *Ib.* And see Story Bailm. § 550; *The Delaware*, per Mr. Justice Clifford, 14 Wall. 579, 602.

intends to perform the transportation upon other than the common-law terms, and take the onus of offering his inopportune objections at the last moment, lays open a field of legal controversy, originating in misunderstandings and an uncertain mutuality. Here the carrier has commonly this advantage of an altercation with his customer, that he may keep his lien alive upon the goods in dispute, if they be not utterly lost or destroyed, refer his customer to the document of receipt, refuse to surrender on other terms, and put the burden of litigation and of disproving a contract upon the party of the two who can less afford to sue, and who is kept out of possession.

But the main question which engrosses the courts in such issues must be whether, under all the circumstances, the sender should be taken to have understood the carrier's notice that he means to transport under a specially qualified responsibility, and to have assented by implication accordingly. The decisions under this head appear somewhat confusing; yet six separate elements for consideration may help to reconcile them; and these we proceed to point out. They are briefly these: (1) the character of the document given into the sender's hands; (2) the carrier's fair effort to make his special terms plain; (3) his seasonableness in announcing these special terms; (4) whether the special terms are brought home to the proper party; (5) honesty and fair dealing on the sender's part; (6) waiver or non-waiver of the terms specially announced.

§ 466. **Character of Document; Bill of Lading; Way-Bill; Receipt, etc.** — 1. The character of the document given into the sender's hands. Bills of lading, for carriage transit by sea or an extensive journey by inland waters, are of such solemnity, both as the means of transferring title, and as the long-established method of evincing the true terms of transportation, that one can hardly be justified in receiving such an instrument without reading its terms.¹ In a less

¹ *Supra*, § 464.

degree the more modern railway bills of lading or way-bills for freight acquire a similar legal importance, especially for extensive distances; and these are sometimes in like manner pledged for advances or transferred outright.¹ But the mere receipts of express or other miscellaneous land carriers are of little consequence, usually, other than to evince, perhaps, an acceptance by the carrier; and, being mainly for the consignor's temporary convenience, and as a voucher which need not be presented at the terminus, and cannot be negotiated as a document of title,² they are seldom read or carefully preserved. And yet, here we should add, that, be the inland conveyance by express or as railway freight, the

¹ See *Farmers', &c. Bank v. Erie R.*, 72 N. Y. 188; *Mulligan v. Illinois Central R.*, 36 Iowa, 181; *Morrison v. Phillips Co.*, 44 Wis. 405; *Wichita Savings Bank v. Atchison R.*, 20 Kan. 519; *Fairfax v. N. Y. Central R.*, 73 N. Y. 167; *Louisville R. v. Brownlee*, 14 Bush, 590; *O'Bryan v. Kinney*, 74 Mo. 125.

² *Railroad Co. v. Manuf. Co.*, 16 Wall. 318, 329, per Mr. Justice Davis; *Strohn v. Detroit R.*, 21 Wis. 554; *Belger v. Dinsmore*, 51 N. Y. 166; *Southern Express Co. v. Newby*, 36 Ga. 635; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 55 Ill. 140; *Boscowitz v. Adams Express Co.*, 93 Ill. 523; *Buckland v. Adams Express Co.*, 97 Mass. 124. But see *Grace v. Adams*, 100 Mass. 505, distinguishing former cases decided in that State; *Boorman v. American Express Co.*, 21 Wis. 152; *Kirkland v. Dinsmore*, 62 N. Y. 171; *Snider v. Adams Express Co.*, 63 Mo. 376; *Hadd v. U. S. Express Co.*, 52 Vt. 335.

The tendency in many States is evidently to place express receipts containing conditions on the same footing as other inland bills of lading. See *Grace v. Adams*, and other cases, *supra*. But such cases lay stress upon the circumstance that the instrument is not given as a mere receipt; but, according to the local usage, as an inland bill of lading. Hence their assumption that the delivery of the document will sufficiently charge the consignor with knowledge of any proper terms of transportation specially stated therein. See *Madan v. Sherard*, 73 N. Y. 329.

There is, however, some confusion on this point, so far as presumptions of assent are concerned. For, in some States, the rule is broadly stated, that the shipper's assent to limitations contained in a railroad or express bill of lading is not necessarily presumed from receiving it; but the question of actual assent is for the jury to determine. *Illinois Central R. v. Frankenberg*, 54 Ill. 88; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 86 Ill. 71; 89 Ill. 43, 152; 90 Ill. 455.

importance of the consignment, and the distance and time of transit, has much to do with assimilating such documents to those which symbolize a carriage by sea; nor can a uniform local custom be disregarded in any case.¹

As to tickets which are used in passenger travel, these, for the most part, are hurriedly bought, and by those who must hurriedly get their baggage taken in charge, and find their places. The passenger's main concern as to the ticket is that the document shall take him personally to a certain destination; and neither such things nor baggage-checks or tokens, if inscribed with special restrictions for baggage liability, would readily attract a traveller's attention before he had actually bailed his baggage and started on the journey.²

§ 467. **The same Subject.** — Thus is our descent from a document which naturally invites a bailor's scrutiny to that which rather seems to repel it. And while, in the absence of fraud, a consignor must commonly be held bound to express qualifications, not inadmissible of themselves, who receives without objection, before bailing his goods, a bill of lading, which, describing them, stipulates clearly in such respects, even where he has not, in fact, read the document,³ the same doctrine does not, necessarily, hold true of receiving the lesser documents of carriage;⁴ though circumstances might render him

¹ *Ib.*

² *Blossom v. Dodd*, 43 N. Y. 264; *Rawson v. Penn. R.*, 48 N. Y. 212; *Woodruff v. Sherrard*, 16 N. Y. Supr. 322; *Malone v. Boston & Worcester R.*, 12 Gray, 388; *Verner v. Sweitzer*, 32 Penn. St. 208.

³ *Germania Fire Ins. Co. v. Memphis R.*, 72 N. Y. 90, and cases cited therein; *Grace v. Adams*, 100 Mass. 505; *Morrison v. Phillips Construction Co.*, 44 Wis. 405; *Hoadley v. Northern Trans. Co.*, 115 Mass. 304. And see *Lewis v. Great Western R.*, 5 H. & N. 867.

⁴ See *Blossom v. Dodd*, 43 N. Y. 264; *Southern Express Co. v. Newby*, 36 Ga. 635; *Adams Express Co. v. Haynes*, 42 Ill. 89. And see *supra*, § 466. But, doubtless, the acceptance of a mere receipt or ticket with seasonable knowledge of its terms will bind the consignor, if the special qualifications be legally admissible. *Adams Express Co. v. Haynes*, *supra*; *Morrison v. Phillips Construction Co.*, 44 Wis. 405.

Some cases incline to excuse the consignor from reading over his receipt

a party to the carrier's terms, as undoubtedly would a direct assent to those terms on his part.¹

§ 468. **Carrier's Fairness in making Special Terms plain.** —

2. Whether the carrier has fairly sought to make plain his special terms to his customer, or rather to bind the customer while keeping those terms from attracting his attention. Written or printed conditions which are to the consignor's disadvantage should, in general, be legibly expressed, in order to avail the carrier; whose conduct ought, substantially, to invite mental action upon his proposal, and not steal from the consignor a heedless acquiescence. Hence those devices, not uncommonly employed with a purpose, but whose purpose is not a material issue, which tend usually to trick the sender out of his rights, and at all events set up equities against the carrier, — such, for instance, as printing the general objects of the carriage in large letters, and the special restrictions in small; stamping obscure words on, obliterating, or covering over, essential phrases; or inserting qualifications out of their natural place, and where they would not naturally attract attention, — are, by our best decisions, strongly discountenanced and disapproved.² And so, too, for similar reasons, our American current of authority sets against sustaining special conditions, which the carrier has printed, written, or stamped upon the

or other document of the lesser sort, where he may well have presumed that it would not differ in terms from those previously understood. *Buckland v. Adams Express Co.*, 97 Mass. 124; *Perry v. Thompson*, 98 Mass. 249; *Strohn v. Detroit R.*, 21 Wis. 554; *Missouri Pacific R. v. Beeson*, 30 Kan. 298. Such cases might come within the scope of the text in § 468.

The contract embodied in such receipts or bills of lading is to be gathered from the whole instrument, and not from detached clauses. *Robinson v. Merchants' Desp. Co.*, 45 Iowa, 470.

¹ As to the nature and characteristics of bills of lading, see further, § 475, *post*.

² *Brittan v. Barnaby*, 21 How. 527; *Perry v. Thompson*, 98 Mass. 249; *Verner v. Sweitzer*, 32 Penn. St. 208; *Blossom v. Dodd*, 43 N. Y. 264; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Jones v. Voorhees*, 10 Ohio, 145; *Madan v. Sherard*, 73 N. Y. 329.

back of his bills of lading, receipts, or tickets; requiring affirmative proof, in such a case, that the sender's attention was so called to the same, and so seasonably, that his assent, as bailor, suitably extended to both sides of the instrument;¹ which appears to be likewise, though less clearly, the English rule.² Fraudulent intent on his part is not essential here, in order that the carrier be debarred from asserting the stipulation; but the fact that his course has put the consignor, in the matter of giving indirect assent, at a decided disadvantage.

Similar objections may apply in other instances where the carrier fails to make his special terms fairly understood by his customer: where, for instance, he gives his document knowingly to an illiterate foreigner, ignorant of the language, without offering to translate it correctly for him;³ or, without any explanation, hands it over to his customer at times and in places where it cannot possibly be easily read in season for the consignor to announce his dissent;⁴ or uses vague and contradictory terms, or employs strange initials or abbreviations, which the customer failed to understand.⁵

§ 469. **Carrier's Seasonableness in announcing Special Terms.** — 3. Seasonableness in the announcement of the special terms. Under the fundamental rule of contracts, that mutual intent upon which the carriage is actually undertaken must prevail

¹ *Railroad Co. v. Manuf. Co.*, 16 Wall. 318; *Brown v. Eastern R.*, 11 Cush. 97; *Newell v. Smith*, 49 Vt. 255; *Ayres v. Western R.*, 14 Blatchf. 9. And this, notwithstanding the face of the ticket or document refers the reader to the back. *Malone v. Boston & Worcester R.*, 12 Gray, 388; *Railroad Co. v. Mannf. Co.*, *supra*.

² *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470; *Parker v. South-Eastern R.*, 1 C. P. D. 618; s. c., on appeal, 2 C. P. D. 416. But see *Harris v. Great Western R.*, 1 Q. B. D. 515, where a passenger was charged with notice of conditions concerning baggage, which were on the back of his ticket.

³ *Camden R. v. Baldauf*, 16 Penn. St. 67. But cf. *Hadd v. U. S. Express Co.*, 52 Vt. 335.

⁴ *Blossom v. Dodd*, 43 N. Y. 261; *Madan v. Sherard*, 73 N. Y. 329. And see *Simons v. Great Western R.*, 2 C. B. n. s. 620.

⁵ See § 480, *post*.

as the true bailment contract, unless both parties are shown to have agreed to a later change. And where carrier and consignor are silent as to terms, and neither custom nor modern statute controls the case, the carriage must be taken to have been upon the terms prescribed by ancient policy. The bill of lading or other document which puts forth or proposes special conditions should come, then, to the sender, or he must be made otherwise aware of such conditions, in time for him to assent or object to the terms, intrust the goods to the carrier or withhold them; and after a bailment is made upon one contract, the carrier cannot, at his sole option, prescribe new terms of carriage. It is true that the mutual agreement, orally expressed at the time of delivery, might be evinced by a bill of lading or receipt made out afterwards, which is expressive of the same terms and conditions; it is true, also, that any verbal understanding of the parties at the outset will merge in a written document which the carrier gives the sender in good season, and before fully accepting the goods, and entering upon the bailment undertaking.¹ And yet the carrier cannot set up the special conditions of such an instrument in prejudice of the sender's rights, when delivered, so as to disclose its special terms, only after the goods were already shipped; for then it is too late for the shipper to refuse transporting on such conditions, and withhold his goods; so that the carrier must abide by the original undertaking as fairly interpreted.²

§ 470. **Whether Special Terms are made known to the Proper Party.** — 4. Bringing the special terms home to the proper

¹ See *Fairfax v. N. Y. Central R.*, 73 N. Y. 167.

² *Bostwick v. Baltimore & Ohio R.*, 45 N. Y. 712; *Shiff v. New York Central R.*, 23 N. Y. Supr. 278; *Gott v. Dinsmore*, 111 Mass. 45; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; 90 Ill. 455; *Michigan Central R. v. Boyd*, 91 Ill. 268; *O'Brien v. Kinney*, 74 Mo. 125; *Cleveland R. v. Perkins*, 17 Mich. 296; *Wilde v. Merchants' Des. Trans. Co.*, 47 Iowa, 272. Cf. *Germania Fire Ins. Co. v. Memphis R.*, 72 N. Y. 90, and other cases, *supra*, § 467.

party under the consignment. The express or implied assent of the sender or owner in due season, which is here requisite, may doubtless be given through the medium of agents;¹ yet the sender's agent for delivering goods to the carrier for transportation is not necessarily his agent for binding him to special modifications of the carriage contract.²

§ 471. **Whether the Sender has acted fairly.** — 5. Whether, upon the whole, honesty and fair dealing are manifest on the sender's part. The early English cases which treated of carriers' notices strongly insisted that the person employing a carrier must make use of no fraud or artifice to deceive him; and, in a familiar instance, one who packed money into an old mail-bag, and stuffed it with straw to give it a mean appearance, was made to bear his own loss, where the bag arrived at the journey's end minus its choicer contents.³ Later cases confirm the same general doctrine; while permitting the sender, so long as he practises no deception to the carrier's injury, to keep silence as to the contents and value of the package he has offered for transportation; and rather leaving the carrier himself to ask such questions for prudence' sake as may not be impertinent.⁴ If, however, the carrier is known to have expressly limited his liability to a specified sum, unless otherwise mutually agreed upon and at higher rates of transportation, silence as to the true value would be less excusable on the sender's part. Such silence may import the sender's assent to the specified limit of value; and the con-

¹ *Squire v. New York Central R.*, 98 Mass. 239; *Grace v. Adams*, 100 Mass. 505, 509, per Colt, J.; *York Co. v. Central R.*, 3 Wall. 107, 113. And see *Story Bailm.* § 558; *Mayhew v. Eames*, 3 B. & C. 601.

² *Fillebrown v. Grand Trunk R.*, 55 Me. 462; *Buckland v. Adams Express Co.*, 97 Mass. 124; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; *American Trans. Co. v. Moore*, 5 Mich. 368.

³ *Gibbon v. Paynton*, 4 Burr. 2298; *Story Bailm.* §§ 565-569; *Orange County Bank v. Brown*, 9 Wend. 115.

⁴ *Ib.*; *Brooke v. Pickwick*, 4 Bing. 218; *Crouch v. London & N. W. R.*, 14 C. B. 255; *Nitro-Glycerine Case*, 15 Wall. 524; *supra*, §§ 423, 424; *Rosenfeld v. Peoria R.*, 2 N. E. Rep. 344.

concealment of value is even said to so far impose upon such a carrier as to work a legal fraud upon him; misleading him upon the degree of security requisite for the undertaking; and depriving him of his adequate reward for the extra risk he incurs.¹

Where, on the other hand, there has been no deceit practised, nor negligence on the sender's part, and the carrier accepted the thing with full knowledge that its true value was far greater than appearances indicated, the latter may not easily take to the cover of implied conditions when asked to respond for a loss, nor denude the owner of his just indemnity.²

§ 472. **Whether the Special Terms have been waived or not.** — 6. Whether or not a waiver of the expressed conditions has been made. In the last instance mentioned,³ it has sometimes been said, the carrier's conduct is a waiver of his general condition; and certainly circumstances which imply a waiver by the carrier of express conditions announced in his documents are by no means to be disregarded;⁴ though the carrier's waiver in one instance does not necessarily import his waiver in another.⁵

§ 473. **Legal Effect of giving Document to Sender.** — Some miscellaneous points as to special contracts of carriage remain to be considered. What, we may first ask, is the legal effect of seasonably putting one's bill of lading, or other sufficient document, which expressly limits the carriage liability, into

¹ *Batson v. Donovan*, 4 B. & Ald. 21; *Story Bailm.* § 568, and cases cited; *Magnin v. Dinsmore*, 62 N. Y. 35; *Oppenheimer v. United States Express Co.*, 69 Ill. 62. See also *Fry v. Louisville R.*, 103 Ind. 265, where deception was used to procure low rates.

² *Marsh v. Horne*, 5 B. & C. 322; *Kember v. Southern Express Co.*, 22 La. Ann. 158; *Southern Express Co. v. Crook*, 44 Ala. 468; *Story Bailm.* § 569; *Orndorff v. Adams Express Co.*, 3 Bush, 194.

³ *Ib.*

⁴ See *Story Bailm.* §§ 569, 572; *Helsby v. Mears*, 5 B. & C. 504; *Minter v. Pacific R.*, 41 Mo. 503.

⁵ *Oppenheimer v. United States Express Co.*, 69 Ill. 62.

the sender's or customer's hands? This act apprises the sender of the carrier's intention to transport under a corresponding modification of his common-law risks in the particular transaction; and warns him to object to such a special acceptance on the carrier's part, or else become bound by it, so far as the terms are not what courts, of their own motion, refuse to sustain. If, then, the sender declines to be bound by such terms, the carrier may demand extra rates for being an insurer of the goods, and carrying on the terms prescribed by public policy; provided, of course, he charges on the whole no unreasonable compensation for his service.¹ Farther than this the carrier cannot rightfully force his customer to his own will. He cannot refuse to carry the goods at all unless the customer yields compliance to his terms; since the rule of the public yields only to a mutual waiver by both parties concerned.²

§ 474. **Proof of Special Contract; Terms, Written, Printed, or Oral.** — Again, special stipulations of common carriage may be written, printed, or simply oral. The true issue in a case of the present sort is, whether a certain contract was entered into; and of this the proof required conforms to ordinary rules of evidence.³ Even usage may, to some extent, be resorted to, in proof that such a contract is to be implied.⁴ The presumption undoubtedly is, that one who, in the exercise of his public vocation, undertakes to transport a thing, does so subject to the common-law liabilities; and this presumption prevails until overcome by countervailing proof of a special agreement as to the terms of carriage.⁵ Where the consignor's

¹ *Kirkland v. Dinsmore*, 62 N. Y. 171, 179, per Andrews, J.

² *Kansas Pacific R. v. Reynolds*, 17 Kans. 251.

³ *American Trans. Co. v. Moore*, 5 Mich. 368; *Cooper v. Berry*, 21 Ga. 526; *Roberts v. Riley*, 15 La. Ann. 103.

⁴ *Cooper v. Berry*, 21 Ga. 526; *Vose v. Morton*, 5 Gray, 594; *Hibler v. McCartney*, 31 Ala. 501. See *Illinois R. v. Snyder*, 38 Ill. 354; *Cox v. Peterson*, 30 Ala. 608; *Steamboat Sultana v. Chapman*, 5 Wis. 454; *supra*, § 448.

⁵ *New Jersey R. v. Pennsylvania R.*, 3 Dutch. 100.

acceptance, without objection, of a bill of lading, or other document reciting special conditions, does not, on principles already discussed, operate by way of estoppel, or conclude the question, that mutual assent which is vital to the special contract is a matter of fact to be proven from writings, or mutual words, acts, conduct, and the attendant circumstances of the bailment.¹ But, as to what constitutes *per se* a special contract of carriage, this is usually a question of law.² That at all events a reasonable limitation of liability on the carrier's part need not be shown by a contract wholly in writing and signed by the shipper, unless the local statute so prescribes, is certain.³

Oral negotiations merge in a subsequent written or printed contract, which embodies the final understanding of the parties at the time the carriage is undertaken upon a completed bailment. The written contract is not to be orally disputed.⁴ But the undertaking being upon a certain written or verbal, express or implied, qualified or unqualified agreement of transportation, nothing short of mutual assent can create new terms or rescind the original contract. Hence, a carrier cannot, while the goods are on transit, vary the original risks by the mere delivery of a written instrument at this late stage; nor escape thus his liability for losses already incurred;⁵ though a clear mutual assent, in such respect, given upon full knowledge on both sides, might establish any variance or waiver of rights.

¹ *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; *Boorman v. American Express Co.*, 21 Wis. 152, 158; *Merchants' Trans. Co. v. Leysor*, 89 Ill. 43.

² *Kimball v. Rutland R.*, 26 Vt. 247. See *Field v. Chicago R.*, 71 Ill. 458.

³ See §§ 466-468; (Mich.) 28 N. W. 685.

⁴ *Hewett v. Chicago R.*, 63 Iowa, 611; *Ortt v. Minneapolis R. (Minn.)* 31 N. W. 519. Nor can usage change the written contract expression. *The Reeside*, 2 Sumn. 567.

⁵ *Gott v. Dinsmore*, 111 Mass. 45; *Gaines v. Union Trans. Co.*, 28 Ohio St. 418; *Bostwick v. Baltimore & Ohio R.*, 45 N. Y. 712; *Cleveland R. v. Perkins*, 17 Mich. 296; *supra*, § 469.

§ 475. **Bills of Lading; their Nature and Characteristics.** —

A few words specially, as concerns bills of lading. Of two or more bills of lading issued under the same transaction, that which is delivered to the sender must govern, in case of discrepancy as to special terms; not that retained by the carrier.¹ And the English rule applicable to general notices appears to be, that where there are two or more inconsistent sets of terms, the carrier will be bound by that least favorable to himself and most favorable to the sender.² But the formal stipulations which are contained in a solemn bill of lading cannot well be disputed by other less formal writings, as, for instance, the language of a mere account for freight given afterwards by the carrier to the shipper of goods.³ Should a carrier fraudulently or inadvertently issue two original bills of lading for the same shipment, he will, as late cases hold, render himself liable for such loss as innocent third parties for value may have sustained in consequence.⁴

Bills of lading, as they commonly run, have a twofold character, being compounded of a receipt and a contract.⁵ So far as such an instrument is a contract, extrinsic evidence is not admissible to vary or superadd to its plain terms;⁶ though it may be allowed to explain doubtful language;⁷ and the

¹ The Thames, 14 Wall. 98.

² Munn v. Baker, 2 Stark. 255; Cobden v. Bolton, 2 Camp. 108.

³ Phillips v. Edwards, 3 H. & N. 813.

⁴ Wichita Savings Bank v. Atchison R., 20 Kan. 519. And see Farmers' Bank v. Erie R., 72 N. Y. 188; Wilde v. Trans. Co., 47 Iowa, 272.

⁵ *Supra*, § 464.

⁶ The Delaware, 14 Wall. 579; Cox v. Peterson, 30 Ala. 608; Shaw v. Gardner, 12 Gray, 488; White v. Van Kirk, 25 Barb. 16; Simmons v. Law, 8 Bosw. 213; Barber v. Brace, 3 Conn. 9.

⁷ Russian Steam Nav. Co. v. Silva, 13 C. B. N. s. 610; Bradley v. Dunipace, 1 H. & C. 521; Wayland v. Mosely, 5 Ala. 430; Vose v. Morton, 5 Gray, 594.

Thus, parol evidence is inadmissible to show that, notwithstanding a clean bill of lading, it was agreed that the goods should be stowed on deck. The Delaware, 14 Wall. 579; Creery v. Holly, 14 Wend. 26. See

obligation to carry and deliver must be construed accordingly. But in respect of its receipt alone, the bill of lading is open to explanation as between carrier and sender; and hence it affords only *prima facie* evidence of the quantity and condition of the goods shipped, so far as they are concerned.¹ The receipt is equally inconclusive and open to explanation as against consignees who have made no advances upon the faith of the bill and stand on the simple footing of a sender.² But a railway carrier is, according to the doctrine of some States, estopped to deny the clear recitals of his bill of lading to one who makes advances in faith thereof;³ though our federal courts lead in denying that the doctrine of *bona fide* purchasers has more than a partial application to instruments of this character.⁴

Sayward v. Stevens, 3 Gray, 97. Or, that the carrier agreed to take a particular route. White v. Van Kirk, 25 Barb. 17. Or, that delivery might be at other than the place specified. Cox v. Peterson, 30 Ala. 608.

But in Chouteaux v. Leech, 18 Penn. St. 224, extrinsic evidence was admitted to show that, by mistake, a printed clause limiting the carrier's liability was not struck out; the clause appearing unsuitable for the particular carriage at all events.

¹ Bates v. Todd, 1 Moo. & R. 106; McLean v. Fleming, 2 H. L. Sc. 128; Portland Bank v. Stubbs, 6 Mass. 422; Sears v. Wingate, 3 Allen, 103, 105, per Hoar, J.; O'Brien v. Gilchrist, 34 Me. 554; Bissel v. Price, 16 Ill. 408; Goodrich v. Norris, Abb. Adm. 196; Pollard v. Vinton, 105 U. S. 7. The rule holds good, notwithstanding a special clause empowering the consignee to deduct any damage or deficiency in quantity from the balance due the captain. Meyer v. Peck, 28 N. Y. 590.

² Berkley v. Watling, 7 Ad. & El. 29; Sutton v. Kettell, 1 Sprague, 309; Blanchard v. Page, 8 Gray, 287; The Lady Franklin, 8 Wall. 325; Hall v. Mayo, 7 Allen, 454. As to the sender, and those who stand on his footing, it may be shown that through the mistake of an agent for different vessels, the receipt acknowledged goods as received for one vessel or responsible carrier, when they were rightfully sent by another. The Lady Franklin, *ib.*

³ Wichita Savings Bank v. Atchison R., 20 Kan. 519; Armour v. Michigan Central R., 65 N. Y. 111; Brooke v. N. Y. R., 108 Penn. St. 529. And see Coventry v. Great Eastern R., 11 Q. B. D. 776. But cf. 93 N. C. 42.

⁴ "A bill of lading is an instrument well known in commercial trans-

§ 476. **Master's Authority to issue Bills of Lading.**—The master of a vessel is the long-established representative of the ship-owners or responsible carrier by water, in signing bills of lading for such goods as may have been thus intrusted for transportation. While the master acts within the true and obvious scope of his authority the owners are estopped as well as himself; and, as against a *bona fide* consignee for value who was no party to the carriage contract, and also a *bona fide* assignee of the bill of lading for value, the master is estopped to deny the truth of the statements, even as to amount and condition, to which he has given credit by his signature.¹ Circumstances may sufficiently justify the presumption of authority on the part of the master to sign bills of lading, so as to protect one who advances money on the faith thereof.² It is not within the general scope of a master's authority, however, to sign bills of lading for any goods which were not actually received on board; though if such bill, through inadvertence or otherwise, is signed prematurely, and the goods are afterwards placed on board, as and for the

actions, and its character and effect have been defined by judicial decisions. In the hands of the holder it is evidence of ownership, special or general, of the property mentioned in it, and of the right to receive said property at the place of delivery. Notwithstanding it is designed to pass from hand to hand, with or without indorsement, and it is efficacious for its ordinary purposes in the hands of the holder, it is not a negotiable instrument or obligation in the sense that a bill of exchange or promissory note is. Its transfer does not preclude, as in those cases, all inquiry into the transaction in which it originated, because it has come into the hands of persons who have innocently paid value for it." Mr. Justice Miller, in *Pollard v. Vinton*, 105 U. S. 7. And see, as to advancements made upon a lost or stolen bill of lading, *Shaw v. Railroad Co.*, 11 Otto, 557.

The receipt, under a bill of lading, is not conclusive upon the carrier as to the quantity of goods received. 21 Fed. R. 590. Nor does it warrant the nature or quality of goods as against a sender's fraud in making up the package so as to deceive by its appearance. 90 N. Y. 430.

¹ *Howard v. Tucker*, 1 B. & Ad. 712; *Tindall v. Taylor*, 4 E. & B. 219; *Grant v. Norway*, 10 C. B. 665; *Bradstreet v. Heran*, 2 Blatchf. 116.

² *The Mary Bradford*, 23 Fed. R. 733.

identical goods therein described, the bill of lading will then operate upon them by way of relation and estoppel, so as to bind all concerned, and just as though it had been signed at the proper time; and the rights of a *bona fide* holder of the bill for value will be protected.¹ Where, however, the party to whom the bill of lading was given had no goods, or the goods so described were never put on board or delivered into the carrier's custody, the owners will not be liable, according to the stronger and more numerous authorities; but the bill is void even in the hands of a *bona fide* holder for value;² though some cases appear to justify a distinction in favor of *bona fide* transferees of the bill of lading for value, as contrasted with the consignor, who must have perpetrated a fraud, and others claiming in his right.³

§ 477. **Rules applied to Inland Bills of Lading.** — The general doctrines of a vessel's bill of lading apply, so far as may be, to bills of lading which are given for land carriage; whose receipt clause, but not the contract portion, will be susceptible of explanation in the same manner as between the corresponding parties of a sea transit.⁴ Inland bills of lading are not commonly given by persons of such extensive authority as a

¹ Rowley v. Bigelow, 12 Pick. 307; The Delaware, 14 Wall. 579, 600. Halliday v. Hamilton, 11 Wall. 560; 8 Biss. 61.

² Grant v. Norway, 10 C. B. 665; Hubbersty v. Ward, 8 Ex. 330; The Schooner Freeman, 18 How. 182; Sears v. Wingate, 3 Allen, 103, 107, per Hoar, J.; 14 Wall. 579, 602; The Lady Franklin, 8 Wall. 325; Pollard v. Vinton, 15 Otto, 7; Baltimore, &c. R. v. Wilkens, 44 Md. 11. And see Meyer v. Dresser, 16 C. B. n. s. 646; Fearn v. Richardson, 12 L. A. Ann. 752.

³ See Armour v. Michigan Central R., 65 N. Y. 111, and cases cited; Wichita Savings Bank v. Atchison R., 20 Kan. 519; 108 Penn. St. 529.

The transferee of a fictitious bill of lading, or of one fraudulently issued, has no remedy against an indorser, unless for the special wrong. Maybee v. Tregent, 47 Mich. 495.

⁴ Harmon v. New York & Erie R., 28 Barb. 323; Illinois Central R. v. Cobb, 72 Ill. 148. See Baltimore & Ohio R. v. Wilkens, 44 Md. 11, as to the guaranty of an inland bill of lading by an association of railroad companies, and the negotiability of such bills.

ship's master, but freight-agents or special clerks are frequently thus empowered to act on behalf of the carrier.¹

¹ Newell v. Smith, 49 Vt. 255. And see Hunt v. Mississippi R., 29 La. Ann. 416; Batavia Bank v. N. Y. R., 33 Hun, 589.

A receipt given by a common carrier for the goods as "in good order," "well-conditioned," and the like, affords, as to the shipper, *prima facie* evidence of their condition, but no more. Nelson v. Woodruff, 1 Black, 156; Choate v. Crowninshield, 3 Cliff. 184; Hastings v. Pepper, 11 Pick. 41; Tarbox v. Eastern Steamboat Co., 50 Me. 339; Tierney v. N. Y. Central R., 17 N. Y. Supr. 569; Illinois Central R. v. Cobb, 72 Ill. 148; Ellis v. Willard, 5 Seld. 529. Such description, too, has reference to external appearance rather than internal condition. Bradstreet v. Heran, 2 Blatchf. 116; West v. Steamboat Berlin, 3 Iowa, 532. See Richards v. Doe, 100 Mass. 524.

"More or less," is an expression used to qualify the quantity, and imports an estimate rather than exact measurement. Kelley v. Bowker, 11 Gray, 428. The statement "Weight, value, and contents unknown," also, qualifies the carrier's general receipt, correspondingly obliging him to account only for what he has actually received. Shepherd v. Naylor, 5 Gray, 591; Jessel v. Bath, L. R. 2 Ex. 267; Lebeau v. General Steam Nav. Co., L. R. 8 C. P. 88; 3 Blatchf. 521; Clark v. Barnwell, 12 How. 272. See Bradley v. Dunipace, 1 H. & C. 521. A printed qualification may thus, in effect, control the written words of the receipt. Jessel v. Bath, *supra*. See also, *post*, as to action for freight.

But while the carrier may show that, notwithstanding his formal receipt of the goods, acknowledging them to be in good order or well conditioned, they were, from some cause not then apparent, in bad order, so that their loss should render the shipper and not himself culpable, this unqualified expression bears strongly against him, and the burden of proof, in such case, is upon him to rebut the *prima facie* case made by his bill of lading. Nelson v. Woodruff, 1 Black, 156; Hastings v. Pepper, 11 Pick. 43. And see Warden v. Greer, 6 Watts, 424; Tarbox v. Eastern Steamboat Co., 50 Me. 339. And, in general, in order to rebut the unqualified expression of a bill of lading, as to quantity and condition, and falsify his own receipt, the *onus* is upon the carrier. See Lord Chelmsford in McLean v. Fleming, 2 H. L. Sc. 128. Notwithstanding, too, the qualified expression of condition, it is commonly fair to presume that the goods were properly packed by the shipper and fit for transportation. English v. Ocean Steam Nav. Co., 2 Blatchf. 425. Cf. Quarter-Casks of Sherry Wine, 14 Blatchf. 517. And under a stated reservation of risk, not absolute but conditional — *e.g.* "not accountable for rust *if properly stored*" — the carrier who invokes the protection of the condition should prove its fulfilment. Edwards v. Steamer Cahawba, 14 La. Ann. 224.

Concerning the application to railway carriers of the rule of Grant v.

If our analogies are correct, the freight-agent or other servant of an inland carrier cannot by the better opinion bind the company, even to a *bona fide* holder for value, by issuing a bill of lading for goods which were never in fact delivered to the carrier; and still less, of course, to the sender.¹

§ 478. **Loss under Special Contract; Remedies; Burden of Proof, etc.** — As to general remedies under a special contract. Where loss or injury occurs to goods in the course of their carriage by special contract, the party claiming damage should set forth the special contract, and not merely allege a breach of the defendant's public engagement as common carrier.² This rule has been strongly asserted where the action was *ex contractu* in form.³ But, under a general declaration which states the receipt of the goods for transportation by the defendant as common carrier, and injury to them through his fault *Norway, supra*, § 476, cf. *Armour v. Michigan Central R.*, 65 N. Y. 111, and *Baltimore & Ohio R. v. Wilkens*, 44 Md. 11. And see *Toledo R. v. Gilvin*, 81 Ill. 511; *Marine Bank v. Fiske*, 71 N. Y. 353; *Wichita Savings Bank v. Atchison R.*, 20 Kan. 519; 108 Penn. St. 529.

¹ *Robinson v. Memphis R.*, 9 Fed. R. 129, where this subject is learnedly discussed. While this decision accords with authorities like *The Schooner Freeman, supra*, it conflicts with *Armour v. Michigan Central R.*, etc., *supra*.

The public policy thus announced is to disfavor the enlargement of a common carrier's risks by treating his receipt for merchandise like a bill or note expressed for so much money. If this be true, the party who advances on a bill of lading must take heed that at least it was duly issued for the goods expressed upon its face. Cf. comments of court in *Pollard v. Vinton*, 15 Otto, 7, upon *New York R. v. Schuyler*, 34 N. Y. 30; *supra*, § 190.

As to non-liability under a forged and raised bill of lading, see 12 Fed. R. 595. Where the master or agent is at fault in giving no bill of lading, the carrier can take no advantage in consequence. *The Peytona*, 2 Curt. 21.

² *Anstin v. Manchester R.*, 10 C. B. 454; *Crouch v. London R.*, 7 Ex. 705; *Fowles v. Great Western R.*, 7 Ex. 699; *Davidson v. Graham*, 2 Ohio St. 131; *Camp v. Hartford Steamboat Co.*, 43 Conn. 333; *Kimball v. Rutland R.*, 26 Vt. 247; *Lake Shore R. v. Bennett*, 89 Ind. 457; 90 Ind. 459.

³ *Ib.*

or negligence, the plaintiff has been permitted to recover, notwithstanding a special contract was set up in defence.¹ And it would appear that where the action is in tort and not contract, the plaintiff need not allege a special agreement, but may leave the carrier to prove one, if he can.²

Non-delivery of the goods, or their delivery at the end of the transit in an injured state, puts the burden of exemption upon the carrier; who, for his immunity in the present case, ought, by proof, to bring himself within the terms of his special engagement. And where the bill of lading or receipt shows the package to have been in good condition when shipped and the sender proves that his own duty was properly performed, the burden is on the carrier to account for an injury.³ But the doctrine is fairly established, that whenever the carrier under a special contract shows, without compromising himself, that the loss or injury for which he is sought to be made answerable was from one of the expressly excepted causes of that contract, — as by fire, for instance, or a peril of lake navigation, — he repels at once the presumption which the failure to successfully perform the transit raised against him.⁴ The party claiming damage may now proceed to show such culpable negligence or misconduct on the carrier's part as really occasioned the loss in question, and ought, therefore, to leave him still chargeable; but the burden of doing so devolves upon this party, no such remissness having been

¹ *School District v. Boston, &c. R.*, 102 Mass. 552. But here the court relied upon the want of a demurrer before appeal, and observed that a declaration thus drawn was not to be commended.

² *Clark v. St. Louis R.*, 64 Mo. 440; *Wertheimer v. Penn. R.*, 17 Blatchf. 421; *Little Rock R. v. Talbot*, 39 Ark. 523. And see *post*, c. 8.

³ 28 Fed. R. 336; *Canfield v. Baltimore R.*, 93 N. Y. 532.

⁴ *Ohrloff v. Briscall*, L. R. 1 P. C. 231; *Clark v. Barnwell*, 12 How. 272; *Transportation Co. v. Downer*, 11 Wall. 129; *Lamb v. Camden & Amboy R.*, 46 N. Y. 271; *Cochran v. Dinsmore*, 49 N. Y. 249; *Sutro v. Fargo*, 41 N. Y. Super. 231; *Thomas v. Ship Morning Glory*, 13 La. Ann. 269; *Farnham v. Camden & Amboy R.*, 55 Penn. St. 53; *Colton v. Cleveland R.*, 67 Penn. St. 211; *The Pereire*, 8 Ben. (U. S.) 301.

established on the carrier's own showing, and the fact of such special stipulation not being controverted.¹

§ 479. **Carriage of Animals under Special Contract.** — The qualified liability by special contract deserves a further mention as applied to the carriage of animals. This sort of freight transportation is attended with peculiar risks; and probably there is no other instance in which American railways have of late years endeavored so strenuously to make their customers insurers of their own freight. The course not unfrequently pursued has been to make the customer sign an agreement to attend to the loading, transporting, and unloading himself, to take all risks of injury to the creatures, and either to go personally, or else send with the animals some special agent to look after their wants. And, as an inducement to these conditions, free tickets, known as “drovers’ passes,” are commonly issued, both in England and America, to those who thus accompany their freight in cattle-trains, the company at the same time disclaiming responsibility as passenger-

¹ *Ib.* “A presumption of negligence from the simple occurrence of an accident seldom arises,” says Mr. Justice Field, in *Transportation Co. v. Downer*, 11 Wall. 129, 131, “except where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it in similar cases, or where it is caused by the mismanagement or misconstruction of a thing over which the defendant has immediate control, and for the management or construction of which he is responsible.” See *Scott v. London Dock Co.*, 3 H. & C. 596. And see *Clark v. Barnwell*, 12 How. 272; *Muddle v. Stride*, 9 C. & P. 380; *supra*, § 439.

But the rule of some States is so far hostile to these special exemptions as to impose upon the carrier, in general, the burden of showing affirmatively that the loss in question was occasioned without his fault. *Union Express Co. v. Graham*, 26 Ohio St. 595; *United States Express Co. v. Backman*, 28 Ohio St. 144; *Swindler v. Hilliard*, 2 Rich. 286; *Baker v. Brinson*, 9 Rich. 201; *Berry v. Cooper*, 28 Ga. 343. See further, as to burden of proof under a special contract, *Mann v. Birchard*, 40 Vt. 326; *Shaw v. Gardner*, 12 Gray, 488; *Czech v. General Steam Nav. Co.*, L. R. 3 C. P. 14, and cases cited; *Adams Express Co. v. Stettaners*, 61 Ill. 184; 3 Mo. App. 495; *Grey v. Mobile Trade Co.*, 55 Ala. 387.

carriers for the life and safety of such persons.¹ This attempt of the carrier to purchase immunity is found reinforced, in certain instances, by the announcement of oppressive rules against customers who refuse to capitulate. Sometimes, without the shadow of a legal right, the carrier refuses to take cattle aboard unless the sender will sign the contract as presented to him;² in other cases he charges, as insurer of the stock, at so high a proportional rate that the customer who elects to abide by the common-law standard of liability must infallibly be ruined.³ The courts are thus confronted, at the present stage of freight development, with contracts purposely framed for excluding all responsibility on the carrier's part, even for his personal negligence and misconduct; and the difficulty has been to adjust the theory of ultimate accountability for the losses of the transit to a consistent and uniform practice.⁴ In England,

¹ As to the liability of a carrier for injury to persons travelling on "drovers' passes," see *Passenger Carriers*, *post*, Part VII. c. 2.

² *Kansas Pacific R. v. Reynolds*, 17 Kans. 251.

³ In *Railroad Co. v. Lockwood*, 17 Wall. 357, 359 (1873), the testimony of the freight-agent of the New York Central Railroad Co. showed that though this company made forty or fifty of these cattle contracts every week, and had carried on the business for years, no other arrangement than this was ever made with any drover. "And the reason," says Mr. Justice Bradley, by way of comment, "is obvious enough, — if they did not accept this, they must pay tariff rates;" which rates, he proceeds to show, were at a difference of three to one, making a charge of \$14 for every animal carried from Buffalo to Albany. "Of course," he adds, "no drover could afford to pay such tariff rates. This fact is adverted to for the purpose of illustrating how completely in the power of the railroad companies parties are; and how necessary it is to stand firmly by those principles of law by which the public interests are protected."

⁴ The force of the rule continues recognized almost universally throughout the United States, that the carrier cannot, by special contract, exonerate himself from loss or injury to animals arising out of his own negligence or that of his servants. *Kansas Pacific R. v. Nichols*, 9 Kans. 235; *Louisville R. v. Hedger*, 9 Bush, 740; *Kinnick v. Chicago R.*, 29 N. W. 772; 75 Ala. 593; *Railroad Co. v. Lockwood*, 17 Wall. 357; *Clark v. St. Louis R.*, 61 Mo. 440; *Illinois Central R. v. Adams*, 42 Ill. 474. And yet in Massachusetts an agreement is held valid by which the owner or shipper of cattle

apart from recent legislation, which aims to protect the public against such conditions, promulgated by the leading shall take the risk of injuries to the animals "in consequence of heat, suffocation, or being crowded." *Squire v. New York Central R.*, 98 Mass. 239. Cf. *Sturgeon v. St. Louis R.*, 65 Mo. 569; *Oxley v. St. Louis R.*, 65 Mo. 629; *Betts v. Farmers' Loan Co.*, 21 Wis. 80; *Mitchell v. Georgia R.*, 68 Ga. 644; 60 Miss. 217; *Dunn v. Hannibal R.*, 68 Mo. 268. But the disposition to rule thus seems partly to have been influenced by the circumstance that the kind of car used was known to the sender. See *Kimball v. Rutland R.*, 26 Vt. 247. And that the sender or his agent travelled in charge of the creatures. See *Bissell v. New York Central R.*, 25 N. Y. 442. And that there was special consideration afforded in the reduced rate, and the drover's pass. See *South Alabama R. v. Henlein*, 52 Ala. 606; 66 Ga. 485.

In New York, however, the carrier is distinctly permitted to divest himself of liability for negligence under such a contract. *Cragin v. New York Central R.*, 51 N. Y. 61; *Penn v. Buffalo & Erie R.*, 49 N. Y. 204. And the ground here taken, as well as in certain other States, is, that the carriage of live-stock was not within contemplation of ancient policy, but is a modern practice subject to lighter risks. *Ib.*; *Louisville R. v. Hedger*, 9 Bush, 645; *Michigan Southern R. v. McDonough*, 21 Mich. 165. But this theory appears to be without foundation in fact. *Supra*, § 370; 52 Iowa, 600.

The New York rule promotes wrong, and is pointedly condemned by the Supreme Court of the United States. *Railroad Co v. Lockwood*, 17 Wall. 357. See also *Illinois Central R. v. Adams*, 42 Ill. 474. And the latest decisions in New York show a disposition to nullify in practice, if not overturn, that pernicious doctrine. *Mynard v. Syracuse R.*, 71 N. Y. 180; 86 N. Y. 275; 89 N. Y. 370; 93 N. Y. 532. But see 97 N. Y. 87.

Some of our States permit the carrier of animals to stipulate against all liability except for "gross negligence." *Bankard v. Baltimore & Ohio R.*, 34 Md. 197. But, in general, such carrier cannot set up the right to use defective and unsafe cars for the transportation under any special contract. See *Railroad Co. v. Pratt*, 22 Wall. 123; *Pratt v. Ogdensburg R.*, 102 Mass. 557; *Indianapolis R. v. Strain*, 81 Ill. 504; *Welsh v. Pittsburg R.*, 10 Ohio St. 65; *Hawkins v. Great Western R.*, 17 Mich. 57.

The carrier may stipulate so as not to be liable beyond a fixed sum for injury to or loss of any single animal, provided this valuation be not unreasonable in amount. *Squire v. New York Central R.*, 98 Mass. 239, 245; *South Alabama R. v. Henlein*, 52 Ala. 606; 56 Ala. 368; *Hart v. Pennsylvania R.*, 112 U. S. 331; *supra*, § 457.

Where the owner contracts to load, unload, and take charge of his stock, and does so, the burden of proving that negligence in the carrier occasioned loss or injury is upon such owner. *Clark v. St. Louis R.*, 64

classes of carriers, as are not "just and reasonable," carriers of animals would seem to be practically at liberty to impose upon their customers whatever terms they please, as the condition of exercising the public vocation they profess.¹ Under any aspect, however, it seems fair enough that the carrier should put upon the drover who accompanies such animals, the primary duty of looking after their natural wants during the transit.²

In an American case, where an owner who had a dog on a railroad train, being informed by the brakeman and baggage-master that the animal could not be allowed in the passenger car, placed it in charge of the baggage-man, and paid the latter for its transportation, and the dog disappeared, it was held, and rightly, that the company must respond for the loss of the dog; and this, notwithstanding it had posted printed regula-

Mo. 440; *Bankard v. Baltimore & Ohio R.*, 34 Md. 197. As to damage to the animals because of delay, see next c.; *Bartlett v. Pittsburgh R.*, 94 Ind. 281; *Ball v. Wabash R.*, 83 Mo. 574. Local legislation sometimes affects this kind of transportation. *Post*, § 486.

¹ It has been considered "just and reasonable" under the Statute 17 & 18 Vict. c. 31, § 7, for the carrier of animals to stipulate against liability for loss or injury from any cause save gross negligence and fraud *Beal v. South Devon R.*, 5 H. & N. 875, and 3 H. & C. 337. And a clause of exemption against loss by heat, suffocation, and the like, in consideration of low rates, appears to be deemed reasonable. *Pardington v. South Wales R.*, 1 H. & N. 392; where unsuitable cars were used. But absolute exemption from liability by special contract is "unjust and unreasonable" under the statute. *Gregory v. West Midland R.*, 2 H. & C. 944; *Allday v. Great Western R.*, 11 Jur. n. s. 12; *Gill v. Manchester R.*, L. R. 8 Q. B. 186. See *post*, § 486; *Ashendon v. London R.*, 5 Ex. D. 190.

Independently of this statute and prior to its passage, the carrier company was allowed to stipulate against injuries to live-stock, "howsoever caused;" and even though the loss was occasioned by his own negligence. *Carr v. Lancashire R.*, 7 Ex. 707; *supra*, § 450.

² See *Louisville R. v. Trent*, 11 Lea, 82; *Central R. v. Bryant*, 73 Ga 722.

It is reasonable for a railway carrier to stipulate that claims for damages shall be made before the horses are mingled with other stock. 34 Kan. 347.

tions at the various stations that "live animals are baggage-men's perquisites." For, to say nothing of the doubtful validity of such a regulation, and, moreover, its dubious tenor, no special notice thereof was brought home to the owner.¹

§ 480. **Use of Concise Expressions or Letters by way of Special Contract.** — Certain concise expressions acquire from mercantile usage in connection with the carriage of freight a precision of meaning, which the initial letters alone might not unfrequently convey. These aim in some cases to qualify the common-law liabilities. "Owner's risk," which is often denoted in bills of lading by the letters "O. R.," may serve as a present instance in point; and the use of this expression by a common carrier serves to throw back the risks of carriage upon sender or owner, so far as public policy will permit of it.² Courts do not readily assume that a flourish of letters in the corner of a bill of lading conveys to the shipper who receives it the full and intelligent import of a specific condition sweepingly to his disadvantage; and such letters, apart from a well-established usage, might no less be interpreted to signify "Ordinary responsibility;" but where such insertion has been made, he should, to well neutralize its effect, set up, not that he did not see the letters (since a bill of lading might take effect, even if he omitted reading it), but that he did not understand their meaning, or supposed they meant something different.³ But apart from such documents, the question

¹ *Cantling v. Hannibal R.*, 54 Mo. 385.

² The usual rule in this country forbids that the "owner's risk" condition should relieve the carrier of liability for negligence or misconduct as an ordinary bailee. *Supra*, § 454; *Morrison v. Phillips Construction Co.*, 44 Wis. 405; *Pemberton Co. v. New York Central R.*, 104 Mass. 144; *Canfield v. Baltimore R.*, 93 N. Y. 532. But some recent English cases incline to permit one to carry at a lower rate, on such special terms, and so stand exempt from loss or injury save that occasioned by "wilful misconduct;" and this, under the Railway and Canal Traffic Act. *Lewis v. Great Western R.*, 3 Q. B. D. 195. And see *Manchester R. v. Brown*, 8 App. Cas. 703; *supra*, § 451.

³ *Morrison v. Phillips Construction Co.*, 44 Wis. 405. As to the

whether the customer assented to such terms, must follow the usual rules of contracts.¹

Whatever letters or abbreviations the carrier may use in the document of carriage, by way of qualifying his risks, the customer is not bound, unless he correctly understood them, or usage gave to these expressions a well-defined meaning of which he should have been cognizant.²

§ 481. **Carrier's Responsibility affected by Legislation.** — III. We finally consider the carrier's bailment responsibility as affected by legislation. Our modern English and American enactments concerning freight-carriage aim, in the present respect, for the most part, (1) to lessen the legal risks of transportation as to certain carriers and specified kinds of property; or (2) to curtail the opportunities which otherwise might be afforded a carrier of ridding himself, upon the plea of a special contract so called, of those obligations he properly owes the public. And this is because the operation of our common law has, in the two corresponding respects for which these changes were sought, grated somewhat harshly upon the common sense of justice.

§ 482. **Acts reducing Ship-owner's Risks, etc.** — The former object was mainly sought in the English statutes of 7 Geo. II. c. 15, and 26 Geo. III. c. 159; which, for the better encouragement of commercial enterprise, exempted owners of vessels from responsibility as common carriers for losses by fire; and provided further, that such owners should not be liable for the loss, by robbery or embezzlement, of specified valuables, such as gold, silver, jewelry, and precious stones, unless the shipper inserted in the bill of lading, or otherwise declared in writing, the nature, quality, and value thereof.³ These stat-
familiar direction "Collect on delivery," or "C. O. D.," which enhances the carrier's responsibility by making him a bailee for the round trip, so to speak, see next chapter.

¹ See *White v. Transp. Co.*, 46 Wis. 493.

² *Rosenfeld v. Peoria R.*, 103 Ind. 121; 3 Col. 280; *supra*, § 468.

³ See *Angell Carriers*, § 90; 2 Kent Com. 606; *Gibbs v. Potter*, 10 M.

utes also pruned down the liability of ship-owners for loss or injury, so that one might not, like a partner, be impoverished for losses happening without his fault or privity; the effect of which provision was to put ship-owners somewhat on the favored footing of stockholders in a corporation.¹ Acts have been passed in Massachusetts, Maine, and other States, in furtherance of the same objects;² while the United States Statutes, which have the widest application to our American marine, are inspired with a like generous regard for the interests of carriers by sea, who must needs encounter unforeseen perils by storm and tempest, scarcely less disastrous to themselves, if disastrous at all, than to their largest consignor of freight.³

& W. 70. See also the Merchant Shipping Act of 1854 (17 & 18 Vict. c. 104, § 503); *Williams v. African Steamship Co.*, 1 H. & N. 300.

¹ *Ib.* And see *Wilson v. Dickson*, 2 B. & Ald. 2; 53 Geo. III. c. 159; 6 Geo. IV. c. 125; 1 Will. IV. c. 68; *Story Bailm.* § 493; *Moore v. American Trans. Co.*, 24 How. 1.

² Mass. St. of 1818, c. 122; Gen. Sts. 1860, c. 52, §§ 18-21; Maine St. of 1821, c. 14; Rev. Sts. 1850, c. 35.

³ U. S. Sts. of 1851, c. 44; U. S. Rev. Sts (1873), §§ 4281-4289. And see *Story Bailm.* § 493; *Angell Carriers*, § 90, and *Lathrop's n.* The decision of the Supreme Court in 6 How. 344 (where a steamboat was burned which carried specie for an expressman) led to the passage of the United States act of 1851, limiting the liability of carriers by water. See 3 Wall. 150, *per curiam*.

The United States Revised Statutes, § 4281, enumerate the following as articles whose lading on a vessel, either as freight or baggage, must be notified in writing, and entered in the bill of lading, in order to charge the master or owner as carriers. "Platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds, or other precious stones, or any gold or silver in a manufactured or unmanufactured state, watches, clocks, or timepieces of any description, trinkets, orders, notes, or securities for payment of money, stamps, maps, writings, title-deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with any other material, furs, or lace, or any of them, contained in any parcel, or package, or trunk." Nor shall any such master or owner be liable for any such goods beyond the value and according to the character thereof

§ 483. **Acts restraining the Transportation of Explosives, etc.** — Other statutes may be found expressive of solicitude on behalf of carriers ; such, for instance, as restrain persons from shipping oil of vitriol, gunpowder, and other inflammable and explosive substances, without making their character clearly known to the carrier at the time of shipment.¹ Here, too, the interests of the general public might be regarded as upheld against all possible connivance of carrier and customer in a reckless transportation.

§ 484. **English Carriers' Act of 1830 ; Railway, etc., Traffic Act of 1854.** — The English "Carriers' Act" of 1830,² to which

so notified and entered. See *Dunlop v. International Steamboat Co.*, 98 Mass. 371; *Pender v. Robbins*, 6 Jones, 207.

Section 4282 exempts the owner of a vessel from loss or damage to merchandise by any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner. See *Walker v. Transportation Co.*, 3 Wall. 150; *The Barque Whistler*, 2 Sawyer, 348; whose tendency is to protect the innocent owner from liability for the negligence of another owner or the owner's agents. But see *Hill Manuf. Co. v. Providence Steamship Co.*, 113 Mass. 495. A land-carrier who ships goods over part of his route in a vessel which he does not own or charter, is not within the provision of this section. *Hill Manuf. Co. v. Boston & Lowell R.*, 104 Mass. 122. Baggage is here included under "merchandise." *Chamberlain v. Western Trans. Co.*, 44 N. Y. 305. Cf. *Brock v. Gale*, 14 Fla. 523.

Sections 4283, 4284, limit the liability of owners of a vessel, for property shipped which is embezzled, lost, or destroyed without their privity or knowledge, to the value of such owners' interest in the vessel and the freight then pending ; applying a general average in suitable cases. Losses by collision (a subject not pertinent to this treatise) are likewise brought within the rule. See *Spring v. Haskell*, 14 Gray, 309.

Section 4287 preserves to parties their just remedies against the master, officers, and seamen of a vessel, notwithstanding the foregoing provisions.

Section 4289 declares that the foregoing limitations of liability shall not apply to the owners of any canal boat, barge, or lighter, or "to any vessel of any description whatsoever, used in rivers or inland navigation." But as to the carriage on our great lakes, see *Moore v. American Trans. Co.*, 24 How. 1. And see *Headrick v. Virginia R.*, 48 Ga. 545.

¹ See U. S. Rev. Sts. §§ 4278-4280, 4288.

² Act 11 Geo. IV. & 1 Will. IV. c. 68. See 1 Chitty Statutes, "Carriers;" Angell Carriers, §§ 255-257.

we have already alluded,¹ had the twofold object of protecting the land-carrier against his customers, and the land-customer against his carrier. On the one hand it afforded to inland transporters of freight a partial immunity as to certain valuables, like that already enjoyed by those who transported by water: providing that, as to enumerated articles exceeding ten pounds in value (chief among which articles were gold and silver, coined or otherwise, precious stones, jewelry, watches, bank-notes, bills, securities for money, pictures, glass, china, and silks), contained in any parcel or package, such carriers should not be made answerable for loss or injury, unless at the time of delivery for transportation the sender should declare the nature and value thereof, and agree to pay an increased rate of charge accordingly.²

¹ *Supra*, § 450.

² "Carrier's Act," 11 Geo. IV. & 1 Will. IV. c. 68, §§ 1-3. The carrier is permitted to bind all senders by a public poster, stating such increased rate of charge. But the sender of valuables, on complying with the provisions of the statute, may require the carrier to sign a receipt for the parcel or package, acknowledging the same to have been insured.

The words "parcel or package," within this act, receive a liberal interpretation. *Whaite v. Lancashire R.*, L. R. 9 Ex. 67. But nice questions have arisen as to whether certain articles are among those enumerated in the act. See *Wyld v. Pickford*, 8 M. & W. 443; *Treadwin v. Great Eastern R.*, L. R. 3 C. P. 308; *Henderson v. London R.*, L. R. 5 Ex. 90.

Section 7 provides that, in case of loss or damage to a parcel or package declared and paid for under the act, the party entitled to recover shall have his increased charges back in addition to the value of the parcel or package. But under § 9 the carrier shall not be concluded by the declared value thereof; and he may compel the party suing for loss or injury to prove the actual value.

Section 8 expressly denies that the statute protects a common carrier from loss arising from the felonious acts of servants in his employ, or takes away a servant's own liability for personal neglect and misconduct. As to how far, under this section, a carrier is estopped from denying that a certain thief was his servant, see *Way v. Great Eastern R.*, 1 Q. B. D. 692; *Machu v. London R.*, 2 Ex. 415. And see *M'Queen v. Great Western R.*, L. R. 10 Q. B. 569, as to what establishes a *prima facie* case of

On the other hand, it aimed at the carrier's privilege of making special exemption by general notice, already a dangerous one.¹ But this act, distinctly professing not to interfere with special contracts, erred of its mark in this respect; and the privilege, fostered by judicial precedent, grew to be still more dangerous.²

But the passage, in 1854, of the "Railway and Canal Traffic Act," whose provisions have since been extended to steam vessels, dates a new era in the carrier jurisprudence of Great Britain.³ Its undoubted purpose was to eradicate with a strong hand abuses which the courts of that country had allowed the most powerful of land-transporters to commit under the cover of making special contracts with the customer.

felony by the carrier's servant. See, further, *Bradley v. Waterhouse*, 3 C. & P. 318. According to Chitty, it seems that if the loss or injury be occasioned by the *personal neglect or misconduct* of the carrier's servant, in a case where the carrier himself is not responsible, such servant may be sued by the owner of the goods for the consequent damage. Chitty Contracts, 10th ed., p. 457.

Chitty, among other general observations as to the effect of this statute, remarks: 1. That the act relates not only to carriers by land, but to cases where the contract is to carry partly by land and partly by sea. 2. That the fact of the goods having been received by the carrier under a special contract does not deprive him of the protection of the act, unless the terms of the contract are inconsistent with his having received the goods in his capacity of a common carrier. See Chitty Contracts, 10th ed., p. 457; citing *Le Conteur v. London R.*, L. R. 1 Q. B. 51; *Baxendale v. Great Eastern R.*, L. R. 4 Q. B. 244.

¹ Carriers' Act, 11 Geo. IV. & 1 Will. IV. c. 68, § 6; *Baxendale v. Great Eastern R.*, L. R. 4 Q. B. 244, 255.

² Carriers' Act, *ib.* Section 4 is the portion which relates to public notices. Section 5 construes "office," and other words used in the act, and makes provision concerning the joinder of parties in suits for loss against common carriers. Of the judicial decisions in England which followed the passage of the Carriers' Act, see *supra*, § 450; *Blackburn, J.*, in *Peek v. North Staffordshire R.*, 10 H. L. 473, 494.

³ Act 17 & 18 Vict. c. 31; extended by Act 31 & 32 Vict. c. 119, § 16 (1868), so far as applicable, to steam vessels. *Cohen v. South Eastern R.*, 1 Ex. D. 217. See *Fisher Harr. Digest*, "Carrier," p. 1466; 4 Chitty Statutes (1865), "Railways," p. 65.

The carrier's privilege was now better aimed at; for Parliament declared that carrier companies of the classes therein specified should continue liable for loss or injury done to animals or goods, in the receiving, forwarding, or delivering thereof, whenever occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration to the contrary. Conditions, however, of such a description might be specially imposed by the carrier, provided the condition was (1) in the opinion of the court or judge before whom a question was tried, "just and reasonable;" also (2) embodied in some special contract in writing signed by the owner or sender of the goods.¹ This legislation still left much to the discretion of the courts; and yet on the whole they have not disappointed the hopes of the public, nor of those who were instrumental in procuring its passage.²

§ 485. **Legislation against Unfair Rates, etc.**—Another section of the English Railway and Canal Traffic Act requires such companies to afford all reasonable facilities to the public, and to give no undue preference or advantage to any particular individual or description of traffic.³ There are statutes

¹ Act 17 & 18 Vict. c. 31, § 7; *Peek v. North Staffordshire R.*, 10 H. L. 473; *Doolan v. Midland R.*, 2 App. Cas. 792. As to what conditions are "just and reasonable," and how far the carrier may specially stipulate for exoneration, notwithstanding this section, see *supra*, §§ 451, 452.

² *Ib.*; *supra*, §§ 451, 452. Under the same section, the burden of proving value and the amount of injury is expressly put upon the person claiming compensation for such loss or injury.

³ Act 17 & 18 Vict. (1854) c. 31, § 2; *Bennett v. Manchester R.*, 6 C. B. N. s. 707; *Evershed v. London R.*, 2 Q. B. D. 254; 3 Q. B. D. 134. Injunction will be granted at judicial discretion to restrain the company from acts of undue preference; each case depending upon its own merits. *Baxendale v. London & South-Western R.*, 12 C. B. N. s. 758; *Palmer v. London & South-Western R.*, L. R. 1 C. P. 588. So will an action lie to recover for overcharges extorted by way of undue preference. *Great Western R. v. Sutton*, L. R. 4 H. L. 226; *Evershed v. London R.*, 2 Q. B. D. 254; 3 Q. B. D. 134. Gratuitous carting, loading, and unloading by the company for particular customers is an undue preference under this section. *Evershed v. London R.*, 2 Q. B. D. 254; 3 Q. B. D. 134. Nor

enacted in many of the United States, whose object is likewise to prevent railways and other carriers from charging unequal or excessive rates,¹ besides the recent act of Congress, whose practical influence is yet to be tested.² These and similar provisions, which bear rather upon the duty of receiving than of transporting property in the exercise of a public vocation, have already been set forth.³

Legislation has sometimes sought, on behalf of third parties holding a bill of lading *bona fide* and for valuable consideration, to make its representation that goods are shipped on board more conclusive upon the carrier than common-law precedents alone would warrant.⁴ And so strong is public sentiment in some parts of our country against allowing railways to qualify their common-law liability by special contract at all, that the legislation of certain States makes all such contracts utterly void,⁵ or else guards the transaction by requiring the sender's signature.⁶

§ 486. **Legislation affecting the Carriage of Animals.** — The carriage of animals, too, has been regulated, to a greater or less degree, by local statutes. Thus, the English Railway and Canal Traffic Act extends to transportation of this character; not only including horses, sheep, swine, and other cattle transported in quantities; but dogs, cats, and other animals.⁷ But can a railway company impose a charge for conveying goods to and from their station, where the customer does not require such service. *Garton v. Bristol R.*, 6 C. B. N. S. 639.

¹ *Commonwealth v. Worcester & Nashua R.*, 124 Mass. 561; *Streeter v. Chicago R.*, 44 Wis. 383.

² *Supra*, § 375; also Appendix. And see 53 Wis. 473. Special contract does not affect the right of penal action. 85 Mo. 90.

³ *Supra*, §§ 374-381. As concerns statutes requiring the carrier to transport freight at request, in the order in which it was received, see *Michigan Southern R. v. McDonough*, 21 Mich. 165.

⁴ See *Valieri v. Boyland*, L. R. 1 C. P. 382.

⁵ 21 Mich. 165; *Brush v. S. A. & D. R.*, 43 Iowa, 554; *Hart v. Chicago R. (Iowa)*, 29 N. W. 597.

⁶ See *Feige v. Mich. Cent. R. (Mich.)*, 28 N. W. 685.

⁷ 2 B. & S. 122; *Ashendon v. London R.*, 5 Ex. D. 190.

the same act fixes an ultimate valuation per head for most kinds of the animals of commerce: limiting the assessment of damages on the owner's behalf accordingly in case of loss or injury, unless, at the time of delivery, the higher value of his animals was specially declared; in which case the carrier is allowed to demand, as the terms of acceptance, an extra compensation for his increased risk and care in respect of them.¹

Local legislation in this country affects, in some instances, the liability of the carrier in the transportation of live-stock;² and humane provisions are imposed by an act of Congress respecting the carriage of animals.³

¹ Act 17 & 18 Vict. c. 31, § 7. A condition not to be liable "in any case" for loss above the specified value, etc., is not "just and reasonable." *Ashendon v. London R.*, 5 Ex. D. 190; overruling *Harrison v. London R.*, 2 B. & S. 122. See also *supra*, § 479.

² Under the Georgia Code liability for damage to live-stock carried in railway trains is greatly reduced. *Mitchell v. Georgia R.*, 68 Ga. 614; 66 Ga. 485.

³ See U. S. Rev. Stats. §§ 4386, 4390; pronounced constitutional in 15 Fed. R. 209.

CHAPTER VI.

TERMINATION OF THE COMMON CARRIER'S BAILMENT RESPONSIBILITY.

§ 487. **When the Carrier's Responsibility ends; General Rule.**—Following the general rule of bailments, there can be no doubt that the common carrier's responsibility for the specific personal property taken by him ceases as soon as he has delivered it over to the designated party at the end of the transit in pursuance of his undertaking; for here the bailment comes to a natural end.

We are to assume (1) that the goods or other personal property thus delivered over are delivered in good condition, or, at all events, injured no more than may be shown to consist with the due performance of the carrier's duty upon the principles already discussed;¹ (2) that no injury has been occasioned by his inexcusable delay; since every carrier is bound to perform the transit, and deliver the property over, within what, considering all the circumstances, is a reasonable time.

§ 488. **Delays how far Excusable.**—For delays irresistible, occasioned by act of God and other excepted causes, the carrier is not, of course, liable;² and usage or a special contract again may tend to relax as, on the other hand, it may tighten his responsibility;³ and, furthermore, the rule is general, that, if the carrier has used due and reasonable diligence in

¹ See cs. 5 and 6.

² *Briddon v. Great Northern R.*, 4 H. & N. 847; *Lipford v. Charlotte R.*, 7 Rich. 409; *supra*, § 403.

³ See *Harmony v. Bingham*, 2 Kern. 99; *The Harriman*, 9 Wall. 161; *Knowles v. Dabney*, 105 Mass. 437.

the transportation, under all the circumstances, this will sufficiently discharge him, even though delay were occasioned by some accident or misfortune not irresistible, or strictly referable to special exception.¹ A delay in putting goods on the transit may be excused on a like ground; though a carrier should more properly refuse to receive where his usual facilities cannot be given.² Even an unreasonable delay in transporting and delivering over cannot, it appears, be set up to charge the carrier with a loss, occurring after he has actually delivered over, which the consignee or consignee's receiving agent might, by due and reasonable diligence on his own part, have prevented.³ And our courts are certainly disposed to deal gently with a carrier whose delay appears trivial or for good excuse, and at all events to require proof of actual damage done thereby to the customer, such as the carrier might well have known would result from his delinquency in this respect.⁴ If there is special reason requiring haste, not dis-

¹ Story Bailm. § 545 *a*; *Taylor v. Great Northern R.*, L. R. 1 C. P. 385; *Parsons v. Hardy*, 14 Wend. 215; Angell Carriers, § 283; *Kinnick v. Chicago R. (Iowa)*, 29 N. W. 772; *Thayer v. Burchard*, 99 Mass. 508; *Wibert v. New York R.*, 2 Kern. 245; *Hand v. Baynes*, 4 Whart. 204; *Galena R. v. Rae*, 18 Ill. 488; *supra*, § 404. Thus, it is held, that a railroad company is not liable for delays occasioned by the act of another company crossing their line by sanction of law. *Taylor v. Great Northern R.*, L. R. 1 C. P. 385. Nor where the detention is caused by an unusual influx of business at the receiving point or on the route, the company providing with reasonable diligence to meet the emergency. *Wibert v. New York & Erie R.*, 2 Kern. 245; *Galena R. v. Rae*, 18 Ill. 488; *Thayer v. Burchard*, 99 Mass. 521; *Helliwell v. Grand Trunk R.*, 10 Biss. 170. And see 6 Duer, 375. Nor where a mob of strikers impedes or interrupts the carriage. *Geismer v. Lake Shore R.*, 102 N. Y. 563; *Lake Shore R. v. Bennett*, 89 Ind. 457.

² See *supra*, § 377.

³ *Michigan Central R. v. Curtis*, 80 Ill. 324.

⁴ See *Page v. Munro*, 1 Holmes, 232; *Pittsburgh R. v. Hazen*, 84 Ill. 36; *State v. Philadelphia R.*, 47 Md. 76; *Silver v. Hale*, 2 Mo. App. 557; *D'Arc v. London R.*, L. R. 9 C. P. 325; *Ward v. New York Central R.*, 47 N. Y. 29; *Illinois Central R. v. McClellan*, 54 Ill. 58; *Deming v. Grand Trunk R.*, 48 N. H. 455; *Michigan Central R. v. Curtis*, 80 Ill. 324.

closed on the face of the consignment, the consignor should make the carrier aware of the fact.¹

On the other hand, a reasonable cause of delay will not justify the carrier's non-performance or negligent performance of his duty; since he ought to apply, in any emergency, reasonably prudent and vigilant efforts to avert or diminish disaster;² and the question is always pertinent, whether the loss or injury was due proximately to his own fault or not.³ And for loss or injury occasioned those employing his services by his unreasonable and inexcusable delay the carrier is liable to them in damages.⁴ An unusual delay causing damage ought, in order to justify the carrier, to be explained by him.⁵

§ 489. **Delivery within Reasonable Time after Arrival.**—Not only should the transit of the goods be made without unreasonable delay; but the delivery over should be within a reasonable time after their arrival so far as in the carrier lies.⁶ Reasonable time is not for abstract computation, but is considered with reference to the circumstances. In general, such delivery should be within a reasonable time after all possible cause of detention is removed,⁷ but on a proper day and at suitable hours for such business;⁸ and for

¹ See 47 Mich. 231; c. 8, *post*.

² *Peck v. Weeks*, 34 Conn. 145; *The Jason*, 28 Fed. R: 323; 88 N. C. 570; *Kinnick v. Chicago R.* (Iowa), 29 N. W. 772.

³ *Supra*, § 431, *et seq.*

⁴ *D'Arc v. London R.*, L. R. 9 C. P. 325; *Cutting v. Grand Trunk R.*, 13 Allen, 381; *Branch v. Wilmington R.*, 77 N. C. 317; *Sturgeon v. St. Louis R.*, 65 Mo. 569; *post*, c. 8, as to damages; 68 Ga. 805. As where the carrier needlessly deviates or carries out of the way. See *Grindle v. Eastern Express Co.*, 67 Me. 317, as to the liability of an express company for failing to deliver, with sufficient despatch to prevent a lapse of the policy, money delivered by a consignor for the new premium on his life-insurance policy.

⁵ See 41 Ark. 476; 37 La. Ann. 468.

⁶ *Story Bailm.* § 545 *a*; *Parsons v. Hardy*, and other cases, *supra*.

⁷ *Lowe v. Moss*, 12 Ill. 477.

⁸ See *Stollard v. Great Western R.*, 2 Best & S. 419; *Richardson v.*

undue delay induced by his own carelessness, the carrier is liable.¹

§ 490. **Delivery to the Right Party.** — The carrier is bound to make delivery over to the right party; in other words, to the true consignee on whose behalf the undertaking was assumed. He cannot deliver goods to the wrong person, however innocently, cautiously, or in the usual course of business, without rendering himself liable as such to the true owner for the disastrous consequences thence ensuing.² The common law, in fact, treats such misdelivery as conversion, and makes the carrier suable in trover.³ Delivery on a forged order, or through fraud of a stranger, will not discharge the carrier.⁴ And the carrier's carelessness in identifying such a stranger as the consignee intended renders him the more surely liable.⁵

Goddard, 23 How. 28; *Merwin v. Butler*, 17 Conn. 138; *Sleade v. Payne*, 14 La. Ann. 453.

The suitable days or hours to be thus regarded have reference rather to the usual receipt of such consignments than common business dealings with the public. Thus, the carrier's proper time for delivering specie at a bank is not necessarily limited to what are termed banking-hours. *Young v. Smith*, 3 Dana, 91; *Marshall v. American Express Co.*, 7 Wis. 1. Cf. *Merwin v. Butler*, 17 Conn. 138. And see *Richardson v. Goddard*, *supra*. A stormy day might, from this point of view, be unsuitable for delivering goods in certain cases. See *The Grafton*, 1 Blatchf. 173.

¹ See 1 Ben. 46.

² *Story Bailm.* §§ 540, 543, 545 *b*; *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Brod. & B. 177; *Southern Express Co. v. Dickson*, 94 U. S. Supr. 519; *Collins v. Burns*, 63 N. Y. 1; *Alabama R. v. Kidd*, 35 Ala. 209; *Winslow v. Vermont R.*, 42 Vt. 700; *Angell Carriers*, §§ 324–326; *The Huntress*, Daveis, 82; *Sanquer v. London R.*, 16 C. B. 163; *Odell v. Boston & Maine R.*, 109 Mass. 50; *Houston R. v. Adams*, 49 Tex. 748.

³ *Ib.*; *Libby v. Ingalls*, 124 Mass. 503; *Indianapolis R. v. Herndon*, 81 Ill. 143; *Devereux v. Barclay*, 2 B. & Ald. 702; *Clafin v. Boston & Lowell R.*, 7 Allen, 311; *Shenk v. Phil. Steam Propeller Co.*, 60 Penn. St. 116.

⁴ *Powell v. Myers*, 26 Wend. 591; *American Express Co. v. Milk*, 73 Ill. 224. See *Marine Bank v. Fiske*, 71 N. Y. 353.

⁵ *Southern Express Co. v. Van Meter*, 17 Fla. 783.

But there may be a delivery to the true consignee, mutually intended, which shall discharge the carrier, notwithstanding the consignee actually imposed upon the consignor by assuming some fictitious name, or otherwise;¹ though here the carrier must have acted honorably by the consignor, and according to the true spirit of his undertaking.² If, however, A fraudulently represents himself to be buying for B, a real person, it is held that the carrier cannot claim that by delivery to the impostor he has delivered to the right person, when the consignor's directions referred to B.³

A delivery to the wrong person can never be excused on the ground that the right one is unknown, and that notice of arrival cannot be given to him.⁴ And as delivery must not be made to a stranger, neither should the carrier take a stranger's directions as to any disposition of the goods.⁵

§ 491. **Delivery to the Owner's Agent, etc.** — Delivery by the carrier to the owner's or consignee's duly authorized agent is good; provided, however, the carrier is prepared to prove such agency; since the consignee's agent at the terminus for some special purpose is not of necessity invested with full power to accept the particular delivery so as to discharge the bailment.⁶

¹ *Dunbar v. Boston & Providence R.*, 110 Mass. 26; *The Drew*, 15 Fed. R. 826; *M'Kean v. M'Ivor*, L. R. 6 Ex. 36; *Samuel v. Cheney*, 135 Mass. 278.

² *Price v. Oswego, &c. R.*, 50 N. Y. 213, holds that a common carrier renders himself liable to the consignor if he delivers goods knowingly to a stranger, which the latter has fraudulently ordered in the name of some fictitious firm, to whom the goods are in reality directed. And see *Winslow v. Vermont, &c. R.*, 42 Vt. 700; *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 Brod. & B. 177. The true principle appears to be, that the carrier must not, carelessly or wrongfully, aid a swindling transaction, but is bound, in his customer's interest, to regard suspicious circumstances brought to his attention.

³ *Edmunds v. Merchants' Trans. Co.*, 135 Mass. 283.

⁴ See Mr. Justice Strong in *The Thames*, 14 Wall. 98, 107; *Little Rock R. v. Glidewell*, 39 Ark. 487.

⁵ *Houston R. v. Adams*, 49 Tex. 748.

⁶ *Coombs v. Bristol R.*, 3 H. & N. 1; 2 Cal. 413; *Ostrander v. Brown*,

§ 492. **Delivering under Bills of Lading, etc.** — In pursuance of our modern practice of making over bills of lading for inland carriage as well as transportation by sea, and so passing title to the goods on transit or procuring advances, the carrier is bound to regard such evidence of ownership, and treat the transferee of the bill, and no other, as presumptive consignee of the property therein described.¹ A carrier who, in disregard of his own bill of lading, delivers over the goods intrusted to him without production of the document at all, runs the risk of being sued in trover by any *bona fide* holder of the bill who had meantime taken it for value.²

§ 493. **Directions of Consignor, etc.** — A carrier is not bound to deliver goods to one who claims to be consignee, where there is nothing amounting to authority or direction from the consignor to make such delivery, except that the latter marked the package with the claimant's initials.³ But such carelessness on the consignor's part will not protect the carrier from a loss occasioned by his entering them on the bill of lading in a stranger's name.⁴

15 Johns. 39; *American Express Co. v. Milk*, 73 Ill. 224. See the peculiar circumstances in *Joslyn v. Grand Trunk R.*, 51 Vt. 92.

The carrier need not prove authority in the person to whom the goods were delivered by him, greater than in any other issue in a civil action. *Wilcox v. Chicago R.*, 24 Minn. 269.

¹ *Alderman v. Eastern R.*, 115 Mass. 233; *The 'Thames'*, 14 Wall. 98; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Joslyn v. Grand Trunk R.*, 51 Vt. 92; *Bass v. Glover*, 63 Ga. 745; *Dodge v. Meyer*, 61 Cal. 405. As to showing the consideration of such a document, see 29 Minn. 363. Usage may affect this question. 133 Mass. 154. So may legislation. 102 N. Y. 120.

² *St. Louis R. v. Larned*, 103 Ill. 293; *Peoria Bank v. Northern R.*, 58 N. H. 203; *Forbes v. Boston R.*, 133 Mass. 154. But if the bills of lading were issued according to custom, in duplicate or triplicate, delivery upon presentation of one of the set may discharge the carrier; and it is to be remembered that such documents of title have not the full advantage of negotiable paper in a holder's hands. *Supra*, §§ 475-477.

³ *Finn v. Western R.*, 102 Mass. 283.

⁴ *Forsythe v. Walker*, 9 Penn. St. 148. And see *Bradley v. Dunipace*, 1 H. & C. 521.

In order to perform the duty of delivery aright, the carrier must regard such knowledge of ownership as he has acquired. Where he has no notice of the ownership of property other than that implied from the relation of the parties to one another as consignor and consignee, he may well take the consignee's directions as to the matter of delivery.¹ But if, on the other hand, he knows that the goods belong to the consignor, and are transported to the consignee merely as his agent, he is not safe in delivering them, without his consignor's knowledge, to a third party on the sole order of the consignee.² Nor, when an owner ships goods to his own address, or his own order, can the carrier, upon any pretext, make delivery to any unauthorized stranger.³ Again, where railway receipts, the evidence of title, with attached drafts, are furnished the carrier, or he receives other plain instructions from the consignor that the goods are only to be delivered on payment of the drafts, a different delivery will amount to conversion on his part.⁴ And, in general, special directions from the consignor for establishing the proper party to whom delivery should be eventually made, must be fairly pursued, in accordance with the carrier's undertaking.⁵

§ 494. **Delivery to Paramount Owner; Good Faith requisite.** — While a bailee cannot avail himself of the title of a third person, even though that person be the true owner, in order to gain title for himself, nor in any case where he has not yielded to a paramount title, he is sufficiently excused where

¹ *Sweet v. Barney*, 23 N. Y. 335; *London R. v. Bartlett*, 7 H. & N. 400.

² *Southern Express Co. v. Dickson*, 94 U. S. 549. And see *Duff v. Budd*, 3 Brod. & B. 177; *Thompson v. Fargo*, 49 N. Y. 188.

³ *Indianapolis R. v. Herndon*, 81 Ill. 143; *Bank of Commerce v. Bissell*, 72 N. Y. 615; *Joslyn v. Grand Trunk R.*, 51 Vt. 92.

⁴ *Newcomb v. Boston & Lowell R.*, 115 Mass. 230; *Libby v. Ingalls*, 124 Mass. 503. And where such instructions are plainly given, it is immaterial that the receipt and draft were not received by the carrier as soon as the goods. *Libby v. Ingalls*, *supra*.

⁵ See *McEwen v. Jeffersonville R.*, 33 Ind. 368.

he has delivered the property to the true owner on his demand, his own course having been honorable. And hence a common carrier may excuse himself by showing that he actually delivered the goods to the true owner, who had a right to immediate delivery, even though such delivery be not according to the consignor's directions or the terms of the bill of lading.¹ But, in case of delivery other than according to the original undertaking, it devolves upon the carrier to prove that he has delivered to the real owner.²

The rule which holds every bailee to honorable conduct towards his bailor forbids, however, that a carrier should connive with a third party to get possession of the goods for the latter's benefit.³

§ 495. **Carrier's Course where doubtful as to the Person entitled to Delivery.** — Inasmuch as delivery to the wrong party proves so disastrous to the carrier, notwithstanding his innocence or the fraud of strangers, he should not be left, when doubt arises, without reasonable opportunity of ascertaining his duty. Hence, his qualified refusal to deliver goods on the demand of one entitled to them does not constitute conversion, if the qualification be reasonable and in good faith; and, if the person making demand omits to produce, on request, any evidence of title, or to identify himself as the consignee, he cannot, as a matter of course, construe the carrier's qualified refusal into an absolute one.⁴ But the carrier's absolute refusal to deliver goods to a person entitled to receive them, who tenders payment of freight and other due charges, constitutes a conversion;⁵ and whether his caution and delay

¹ The Idaho, 93 U. S. 575; *Western Trans. Co. v. Barber*, 56 N. Y. 544; 1 Woods, 131; *Bassett v. Spofford*, 45 N. Y. 387.

² *American Express Co. v. Greenhalgh*, 80 Ill. 68.

³ 16 Fed. R. 57.

On the other hand, a carrier should not collude with his consignor to the injury of the consignee. *Robinson v. Memphis R.*, 16 Fed. R. 57.

⁴ *Alexander v. Southey*, 5 B. & Ald. 247; *McEntee v. New Jersey Steamboat Co.*, 45 N. Y. 34.

⁵ *Ib.*

were reasonable or unreasonable depends upon the facts of the case.¹

Like other bailees, however, who are perplexed as between conflicting claimants, the carrier may interplead parties and leave the courts to decide who should have the goods.²

§ 496. **Where Goods are addressed "Care of," etc.** — Ordinarily, the address of goods to the care of any one is an authority to the carrier to deliver them to such a party, and so discharge himself. But, if the person to whom the goods are thus addressed is the agent and principal representative of the carrier himself, this is held to imply a mere expansion of the ordinary direction to have them stopped at the place on the route where that agent is in charge of the business, rather than that the carrier's responsibility shall there terminate, and that of his agent be personally substituted;³ though some circumstances would seem to justify a different construction.⁴ The consignor's direction, too, to notify a third person of the arrival of goods, is not tantamount to authorizing delivery to him.⁵

§ 497. **Misdelivery through Consignor's Carelessness, etc.** — Where misdelivery occurs, however, through the consignor's carelessness in misdirecting the goods, or directing them imperfectly, or where, through some delay in delivery, attributable to the owner's act, a loss is suffered, it is not the carrier who should suffer the consequences.⁶ But errors of direction on the sender's part do not justify a misdelivery through the carrier's own fault.⁷ And a carrier must regard all his

¹ *Baltimore R. v. Pumphrey*, 59 Md. 390.

² *Supra*, § 118.

³ *Russell v. Livingston*, 16 N. Y. 515.

⁴ *Fitzsimmons v. Southern Express Co.*, 40 Ga. 330. See *Ela v. Am. Merchants' Union Express Co.*, 29 Wis. 611; *Mobile, &c. R. v. Prewitt*, 46 Ala. 63.

⁵ *Bank of Commerce v. Bissell*, 72 N. Y. 615.

⁶ See *Southern Express Co. v. Kaufman*, 12 Heisk. 161; *Stimson v. Jackson*, 58 N. H. 138; *supra*, §§ 421-426.

⁷ See *McCulloch v. McDonald*, 91 Ind. 240; 115 Ill. 407.

directions as to delivery and not marks on the goods alone.¹

Nor, once more, is the carrier chargeable, if he has made due delivery to the consignee or his agent, and a fraud is then practised upon the consignee by which the goods are obtained to the consignor's injury; for here the consignor's remedy is against his consignee and not the carrier.²

§ 498. **Failure to deliver because of Legal Process.**—It is regarded in some States a breach of the carrier's contract not to make delivery of goods which have been improperly attached and detained under legal process; so that he cannot defend, in an action brought against him for the non-delivery, that they were taken from him against his will and without fraud or collusion on his part, or that he was ignorant of the nature of the goods, and supposed the attachment to be valid.³ Yet it seems hard that an honest carrier should thus suffer, where the law defeats this performance by taking paramount custody of the goods, regardless of his wishes, even though others set the machinery in motion, without, as it may quite tardily prove, a good cause. It appears that the actual detention of his goods by legal process may, under reasonable circumstances, be a justifiable defence on the carrier's behalf when sued in trover as for their conversion;⁴ and the rule of New York and Indiana is a just one, which excuses the carrier from liability for not carrying and delivering the goods, so far as, without his fault or connivance, legal process deprives him of possession and the means of performance, provided he give

¹ *Libby v. Ingalls*, 124 Mass. 503. And see *Mahon v. Blake*, 125 Mass. 477. In *Guillaume v. Transp. Co.*, 100 N. Y. 491, the carrier received gold, rightly directed, but returned a bill of lading with a misdirection; and his misdelivery was not excused.

² *Ryder v. Burlington R.*, 51 Iowa, 460.

³ *Edwards v. White Line Transit Co.*, 104 Mass. 159; 117 Mass. 591; *Faust v. South Carolina R.*, 8 S. C. 118. Cf. *French v. Star Transp. Co.*, 134 Mass. 288, which modifies this doctrine.

⁴ *Stiles v. Davis*, 1 Black (U. S.), 101.

prompt notice of such dispossession to the parties in interest, that they may protect their rights.¹

§ 499. **When Stoppage in Transitu prevents Delivery.**—If the owner of goods sells them on credit, and ships them to the vendee as consignee, with bills of lading in the usual form, and afterwards, hearing of the vendee's insolvency, stops them in transit, notifying the carrier accordingly, his stoppage-right cannot avail against a *bona fide* third party, having no knowledge of such insolvency, or of other circumstances which would render the bill of lading not fairly assignable, who makes advances on the faith of the bill of lading, and becomes indorsee accordingly; and the carrier should deliver in recognition of such party's rights.² But, as between the unpaid consignor and his insolvent consignee, it is held that the right of stoppage *in transitu* may continue after the actual transit is ended, and while the goods, in default of the consignee's demand for them, are held in warehouse for those rightfully entitled thereto.³ It is for the owner, not the carrier, to take active steps in stopping goods *in transitu*.⁴

§ 500. **Carrier's Duty as to Unclaimed Property; Storage, etc.**—Where, after due inquiry, the true consignee cannot be found, or is ascertained to be dead or absent, it becomes the duty of the carrier to keep the goods until they are claimed, or to

¹ *Bliven v. Hudson River R.*, 36 N. Y. 403; *Ohio, &c. R. v. Yohe*, 51 Ind. 181. And see, *supra*, § 428, as to loss or injury by public authority; *Wells v. Maine S. S. Co.*, 4 Cliff. 228.

That loss by act of God, act of public enemies, act of customer, or act of public authority, excuses the carrier from delivery over, so far as such cause operates,—not to add other losses properly excepted by special contract, etc.,—must be borne constantly in mind. *Supra*, cs. 4 and 5.

² *Newhall v. Central Pacific R.*, 51 Cal. 345. See *Lee v. Kimball*, 45 Me. 172.

³ *Worsdell, in re*, 6 Ch. D. 783. As to the right of stoppage *in transitu*, see, more generally, 2 Schoul. Pers. Prop. § 558.

⁴ *French v. Star Transp. Co.*, 134 Mass. 288.

store them prudently for and on account of the owner.¹ And if the consignee refuses to receive the goods on tender and pay freight, the carrier has likewise the right to store them on the owner's behalf.² By acting thus, the carrier divests himself of his extraordinary responsibility, and becomes for his custody, like any warehouseman, liable only for ordinary care and diligence,³ or even for less, if the circumstances warrant regarding him as a merely gratuitous bailee.⁴ Even thus, however, he cannot deliver to a mere stranger, or the wrong party; though for losses by theft, fire, and the like, he should doubtless be held far less rigidly accountable.⁵ Nor can the carrier, under the strict rule of the common law, make sale of such goods for his charges, unless, possibly, where they must otherwise perish on his hands and become worthless.⁶

That a carrier may be justified in storing the goods with another he must not have been wanting in proper efforts to find the consignee, so as to give the latter an opportunity to accept or refuse delivery, and pay freight.⁷ But after he has

¹ The Thames, 14 Wall. 98; Angell Carriers, § 325; *Fisk v. Newton*, 1 Denio, 45; *Witbeck v. Holland*, 45 N. Y. 13.

² *Great Northern R. v. Swaffield*, L. R. 9 Ex. 132; *Heugh v. London R.*, L. R. 5 Ex. 51; 24 Fed. R. 815. The carrier need not invariably give the consignor notice of such non-acceptance. *Fisk v. Newton*, 1 Denio, 45; *Kremer v. Southern Express Co.*, 6 Coldw. 356; *American Express Co. v. Greenhalgh*, 80 Ill. 68. See 27 Kans. 238. Nor is it safe for a carrier to assume that because the consignee cannot be found, the consignor or his agent should receive the goods. *Wilson Machine Co. v. Louisville R.*, 71 Mo. 203. But the carrier should be cautious not to mis-deliver upon the consignee's refusal to receive, in disregard of the consignor, or true owner. 83 N. C. 158; *supra*, § 490. Cf. *Dobbin v. Michigan R.*, 56 Mich. 522.

³ *Ib.*

⁴ See *Kremer v. Southern Express Co.*, 6 Coldw. 356; *Marshall v. American Express Co.*, 7 Wis. 1; *post*, § 516.

⁵ See *supra*, § 117; *Story Bailm.* § 450; *Parker v. Lombard*, 100 Mass. 405; *Smith v. Nashua R.*, 7 Fost. 86; *Bickford v. Metropolitan Steamship Co.*, 109 Mass. 151; *Alabama R. v. Kidd*, 35 Ala. 209; *Indianapolis R. v. Herndon*, 81 Ill. 143.

⁶ *Rankin v. Memphis, &c. Packet Co.*, 9 Heisk. 564.

⁷ *Sherman v. Hudson River R.*, 64 N. Y. 254.

so stored them properly, and has received from the warehouseman reimbursement of his own charges, the presumption arises that the warehouseman takes the storage on behalf of the true owner or consignee, rather than as the carrier's own bailee.¹

§ 501. **Delivery to Joint Parties, etc.** — Where a package really belonging to A alone is sent directed to the firm of A & B, A may prove his sole claim and recover, though producing no assignment, order, or acquittance of any sort from B.² For the right of a paramount owner must be respected by every bailee, whenever the claim is seasonably made upon him, be his bailor's directions what they may; provided of course, the bailee has acted not collusively but in good faith.³

As a rule, however, the carrier's duty is to deliver according to his consignor's directions; and where the package is directed to two or more persons jointly, he should deliver to both, or to either of them for both.⁴

§ 502. **What constitutes a Complete Delivery.** — That surrender of possession which constitutes a complete discharge of the carrier's trust must be attended with no circumstance, on his part, such as would impair the title of the consignee, or affect the latter's peaceful enjoyment of the property.⁵

¹ *Hamilton v. Nickerson*, 11 Allen, 308; 13 Allen, 351. But cf. *Bickford v. Metropolitan Steamship Co.*, 109 Mass. 151. If the consignee of a horse fails to call for it within a reasonable time after its arrival, the carrier may put the animal out to a livery-stable keeper at the owner's charge. *Great Northern R. v. Swaffield*, L. R. 9 Ex. 132.

² *Wells v. American Express Co.*, 55 Wis. 23; s. c. 44 Wis. 342; *Sheridan v. New Quay Co.*, 4 C. B. N. S. 616.

³ *Supra*, § 494. Cf. *Angell Carriers*, § 355, and *Story Bailm.* § 582, criticised, *supra*, which lean to the opinion that the bailee cannot dispute the bailor's title unless evicted by title paramount.

⁴ *Wells v. American Express Co.*, *supra*.

⁵ See *Howland v. Greenway*, 22 How. 491, where, through the master's carelessness in making up his papers, the goods became confiscated at the port of destination. The ship-owners were here held liable, because it was the master's duty to know the revenue and navigation laws of the country with which he traded.

§ 503. **Carrier's Duties in Unloading, etc.** — The carrier, with respect to unloading, has duties which, though varying with time and circumstance, regard always the natural wants and inherent qualities of the thing itself. Thus, a modern ferry should provide suitable means of egress as well as ingress, and keep the drops in good order and well cleared to allow teams to be driven off the boat safely.¹ And a railway company which transports live-stock ought not only to have proper machinery and facilities for unloading them whenever, in the course of the transit, it may be necessary to unload them for exercise and refreshment, but also to unload, feed, and water them at the journey's end, if there be delay in making delivery over and discharging the carrier from liability, and the health of the animals requires this to be done.² As to the permitted period for unloading a vehicle, the law implies, in the absence of special contract, that this shall be within a reasonable time after its arrival.³

§ 504. **Methods of Unloading; Carrier and Consignee.** — If a common carrier, in pursuance of the duty of making delivery, uses the tackle, machinery, lighters, or cars of a third person, and damage ensues, by the breaking of the tackle or the like, the thing is his *pro hac vice*, so as to make him responsible therefor to his own customer, as he would have been for his own in delivering.⁴ But if the consignee, or his agent or other bailee, uses such tackle, machinery, or other convenience for himself, after the carrier's duty is performed, and the goods are received into his own custody and control, the carrier is not chargeable for the defects of the thing.⁵

¹ *Supra*, §§ 395, 445; *Willoughby v. Horridge*, 12 C. B. 742; *White v. Winnisimmet Co.*, 7 Cush. 155; *Angell Carriers*, § 82.

² See *Dunn v. Hannibal, &c. R.*, 68 Mo. 268.

³ *Henley v. Brooklyn Ice Co.*, 14 Blatchf. 522.

⁴ *Angell Carriers*, §§ 194, 282, 330; *De Mott v. Laraway*, 14 Wend. 225.

⁵ *Ib.*; *Thomas v. Day*, 4 Esp. 462; *Lewis v. Western R.*, 11 Met. 509; *Loveland v. Burke*, 120 Mass. 139. And see *Blakemore v. Bristol R.*, 8 E. & B. 1035; *supra*, §§ 121, 396.

Where the proper consignee of goods is present, accepts the consignment, and pays the freight, and the goods are accordingly unloaded with reasonable opportunity for him to remove them, custody is transferred from the carrier, and responsibility devolves upon the consignee to secure them from the weather and depredation, and otherwise make disposition of them.¹

§ 505. **Consignee's Right to intercept Goods on Transit.** — With the consent of the carrier, any consignee may intercept his goods on the transit, and assume the risks accordingly; but not necessarily to the prejudice of a consignor or true owner of the goods,² nor so as to deprive the carrier of his just reward.³

§ 506. **Notice without Personal Delivery, etc.** — In certain modes of conveyance, the carrier, on reaching the end of his transit, becomes bound, not to seek out the consignee, in order to make personal delivery, but only to give due notice that the consignee may come and take his goods from the carrier's premises. "Carriers by ships and boats," it has been said, "must stop at the wharf; railroad cars must remain on the track. In these cases, notice should be given to the consignee of the arrival and place of deposit, which comes in lieu of personal delivery."⁴ At the same time it has generally been conceded that common carriers are *prima facie* under obligation to make personal delivery to the consignee.⁵ Usage and special contract shape the duty very considerably in modern times, as will presently be shown. Thus among inland carriers a railway commonly makes no personal delivery,

¹ Goodwin v. Baltimore & Ohio R., 50 N. Y. 154.

² See Dewey, J., in Lewis v. Western R., 11 Met. 509, 515.

³ Post, § 527.

⁴ Cowen, J., in Gibson v. Culver, 17 Wend. 305, 311.

⁵ Ib.; 2 Kent Com. 604, 605; Story Bailm. § 543, and cases cited; Hyde v. Trent Nav. Co., 5 T. R. 389; Storr v. Crowley, 1 M'Clel. & Y. 129; Golden v. Manning, 3 Wils. 429; Angell Carriers, §§ 313-317; Fisk v. Newton, 1 Denio, 45; The Thames, 14 Wall. 98.

while with an express or teamster it is the reverse. But that usage or contract ought to be clearly established, under which a carrier can assume to clear himself by simply leaving the goods at his own place of deposit, to be called for, without at least giving the consignee notice of their arrival.¹

As to giving notice, public notice has been ruled insufficient;² nor is it unreasonable that the carrier's care of the goods should continue until knowledge of such notice is brought home to the proper party.³ Where formal notice is required to be given, it should be properly directed, in accordance with the carrier's means of knowledge; and imperfect direction or misdirection, such as prevents the notice from reaching its destination through the mail, is inexcusable, where the package was duly directed by the shipper.⁴ But the carrier's failure to give notice is, in general, excusable, whenever a consignee or the indorsee of a bill of lading for delivery to order is unknown, or is absent, or cannot, after diligent search, be found;⁵ and here, once more, it becomes the carrier's duty to retain the goods until they are claimed, or to store them prudently for and on account of their owner, thus divesting himself of the risks of extraordinary bailee.⁶

§ 507. **Undertaking to collect on Delivery; C. O. D.**—Common carriers at the present day frequently undertake to collect the consignor's demand upon the consignee simultaneously with making delivery of the goods to the latter party, and

¹ Proof of such usage is admitted in *Gibson v. Culver*, 17 Wend. 305; *Farmers' Bank v. Champlain Trans. Co.*, 16 Vt. 52; 18 Vt. 131.

² *Rome R. v. Sullivan*, 14 Ga. 277; *Kohn v. Packard*, 3 La. 224.

³ *The Thames*, 14 Wall. 98; *Angell Carriers*, § 315; *Pickett v. Downer*, 4 Vt. 21; *Sherman v. Hudson River R.*, 64 N. Y. 254.

⁴ *Union Steamboat Co. v. Knapp*, 73 Ill. 506.

⁵ *Fisk v. Newton*, 1 Denio, 45; *The Thames*, 14 Wall. 98, 107, per Mr. Justice Strong.

⁶ *Ib.*; *supra*, § 500.

remit the same to the former; and the letters "C. O. D." placed upon the package are in some States held to have acquired a mercantile sense sufficiently importing such a direction from the consignor, who, however, ought to furnish the carrier with receipted bill or other memorandum of the amount to be collected, or place such direction plainly upon the package.¹ Carriers undertaking to collect on delivery are bound either to collect and remit the cash, or else return the goods as for the consignee's default;² but express companies, upon whom this duty commonly devolves, sometimes advance to the sender the amount of his bill to save the trouble of remitting afterwards the amount collected. Where the consignor sends his goods by one carrier, such as a railway, and sends the bill for collection by another, — for instance, an express company, — it is enough to discharge the latter that the bill is promptly returned on refusal of payment; the carrier of the goods having delivered them to the consignee himself, so that the carrier holding the bill did not have them in possession.³ Nor does the undertaking to collect on delivery necessarily keep the bailee strictly liable as common carrier, as it appears, while the consignee delays payment upon a demand and tender of the goods, and the property continues in the carrier's warehouse.⁴ In numerous instances, the carrier who takes a parcel with directions to collect on delivery is justified in giving the consignee opportunity to inspect the package before

¹ *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430; *American Express Co. v. Greenhalgh*, 80 Ill. 68; *American Express Co. v. Lessem*, 39 Ill. 312; *United States Express Co. v. Keefer*, 59 Ind. 263; *Hutchings v. Ladd*, 16 Mich. 493; *Collender v. Dinsmore*, 55 N. Y. 200. *Seem*, that indorsing on the bill, "Please collect the bill," is a mere request of the carrier, and not a direction. *Tooker v. Gormer*, 2 Hilt. 71. At all events, parol explanation cannot contradict or vary the express language of full written directions.

² *Ib.* But see *Rathbun v. Steamboat Co.*, 76 N. Y. 376, cited in § 508.

³ *Wells v. American Express Co.*, 44 Wis. 342.

⁴ *Weed v. Barney*, 45 N. Y. 314.

paying, in order to ascertain whether the bill sent is a correct one.¹

§ 508. **Ratification or Waiver on the Customer's Part.**—The customer may by his acts and conduct, as well as by formal writing, ratify the carrier's performance or waive a complete delivery by the latter. Thus, if a carrier charged with goods to collect on delivery² should take the consignee's check in payment, the consignor, after accepting such check unconditionally in satisfaction of the carrier's performance, cannot sue the carrier if it turns out worthless.³ And an unauthorized delivery of goods by the carrier may be ratified by the party who is entitled to them.⁴ That a consignee may so intercept the goods as to relieve the carrier from transporting them to the terminus we have already seen.⁵

§ 509. **Bearing of Usage, etc., upon Modern Rules of Delivery.**—But, as a practical issue, there is far more uncertainty in determining the exact point at which our modern common carrier's liability terminates than the foregoing statements indicate; and this chiefly because usage and special contract regulate the whole matter to a considerable extent, and because of the complexity and magnitude of modern inland transportation; so that not only has the rule become a different one for different classes of common carriers, but it is bent so as to suit the shifting business modes of different localities.

§ 510. **One may be Carrier for Transit and Simple Bailee after Arrival.**—We are in the first place to observe that one may

¹ Lyons v. Hill, 46 N. H. 49.

See also Libby v. Ingalls, 124 Mass. 503, as to the practice of sending a railway receipt with draft attached, to indicate that delivery is only to be made on payment of the draft.

² See § 507.

³ Rathbun v. Steamboat Co., 76 N. Y. 376.

⁴ Converse v. Boston & Maine R., 58 N. H. 521; Dobbin v. Michigan R., 56 Mich. 522.

⁵ *Supra*, § 505.

hold goods as common carrier or insurer for a transit, but, for various reasons, retain them with the less onerous risks of a warehouseman or ordinary bailee for hire, at the place of destination, without ever having actually delivered over or parted with possession. This is a peculiarity not often noticeable in other bailments, but here constantly to be borne in mind ; so that if, for instance, goods which had safely reached the journey's end were accidentally burnt up, or plundered by a mob, before that final delivery over which legally terminates a bailment, a court would often be perplexed to say whether the present bailee were liable or no for the loss ; or, in other words, whether his standard of responsibility should be deemed exceptional or ordinary.

To determine such a question, it is material to consider whether the common carrier is legally bound as such to make delivery over, or the consignee must come and fetch them ; and, in the latter case, whether notice must be given and sufficient time allowed to elapse after arrival of the goods to enable such a party fairly to perform his duty. In both respects our law is far from being exact, and local usage sways the English and American courts considerably, as we now proceed to show.

§ 511. **Mode of Delivery by Vessel ; Responsibility how divested.** — Where goods are brought by water, the rule long sanctioned in Great Britain has been that delivery on the usual wharf will discharge the carrier ;¹ and such, too, is the American rule.² This applies with especial force to transportation between foreign ports, which for centuries has involved the use of bills of lading ; and a bill of lading is quite commonly specific on the point involved, whether in creation or confirmation of some commercial usage as to the method of terminat-

¹ 2 Kent Com. 604, 605 ; Story Bailm. §§ 544, 545 ; Angell Carriers, §§ 309-312 ; Hyde v. Trent Nav. Co., 5 T. R. 389.

² *Ib.* ; Cope v. Cordova, 1 Rawle, 203 ; Chickering v. Fowler, 4 Pick. 371 ; Price v. Powell, 3 Comst. 322.

ing the vessel's liability.¹ This usage at the present day generally requires the consignee to take off his merchandise in lighters from the vessel's side on its arrival in port; otherwise the carrier shall land the goods on the wharf,² or finally shall warehouse them if they are not called for, and advance payment of government duties, at the cost of those entitled to the property, especially if the consignee unreasonably delays doing so.³ In landing on the wharf or storing goods, the carrier should have delicate, perishable, and valuable merchandise properly guarded against exposure to the weather or depredation; and justice requires that, before or at the time of landing, due and reasonable notice be given the consignee that the goods have arrived, in order that the latter may have fair opportunity to protect and remove them, and save special warehouse charges.⁴ The same general usage (except as to paying government duties), together with the issue of bills of lading, applies commonly to carriage between domestic ports and inland transportation by water; but local exceptions may prevail.⁵

¹ Story Bailm. § 544; *Richardson v. Goddard*, 23 How. 28; 1 Cliff. 383, 396.

² For usage of the port of London, as to discharging goods from steamers, and the terms expressed in bills of lading accordingly, see *Petrocochino v. Bott*, L. R. 9 C. P. 355.

³ *Wilson v. London Steam Nav. Co.*, L. R. 1 C. P. 61; *Redmond v. Liverpool Steamboat Co.*, 46 N. Y. 578; *The Eddy*, 5 Wall. 481; *The Thames*, 14 Wall. 98; *McAndrew v. Whitlock*, 52 N. Y. 40; *Collins v. Burns*, 63 N. Y. 1; *The Tybee*, 1 Woods, 358.

⁴ Story Bailm. § 545; 2 Kent Com. 601; *The Eddy*, 5 Wall. 481; *Graves v. Hartford Steamboat Co.*, 38 Conn. 143; *Morgan v. Dibble*, 29 Tex. 107; *Angell Carriers*, § 313; *Richardson v. Goddard*, 23 How. 28; 1 Cliff. 383, 396. Delivery to a drayman not authorized by the consignee, neither discharges the carrier nor dispenses with notice. *Ostrander v. Brown*, 15 Johns. 39; *Dean v. Vaccaro*, 2 Head, 488. As to newspaper publication by way of notice, see 6 Ben. 517. To land and store the goods without giving notice or an opportunity to inspect does not relieve the carrier. Chase Dec., 125.

⁵ *Crawford v. Clark*, 15 Ill. 561; *Union Steamboat Co. v. Knapp*, 73 Ill. 506; *McAndrew v. Whitlock*, 52 N. Y. 40; *Young v. Smith*, 3 Dana, 91.

§ 512. **Delivery by Land-Carrier; Responsibility how divested.** — Concerning transportation by land, there has long been a diversity of opinion as to the proper mode of terminating liability. Judge Story, with excessive caution, has observed that the inclination had been (not without some diversity of judicial opinion) to require the carrier, in the absence of some different contract or custom of trade, to make a personal delivery to the owner.¹ But he more strenuously contends that, in the absence of clear usage or contract to the contrary, the carrier is bound to give reasonably prompt notice of the arrival of the goods to the persons, if they be known, to whom the goods are directed.² There is, however, at the present day much doubt as to the obligation in these respects; though less regarding the latter duty, which only they who condemn the policy of making the carrier an insurer can consistently ask to dispense with.

See, as to exceptional rules for inland transportation, *Hemphill v. Chenie*, 6 W. & S. 62; *Sultana v. Chapman*, 5 Wis. 454. If the consignee presents himself seasonably to receive his goods conformably to the contract, the carrier ought not to put him to the expense of storage. *Graves v. Hartford Steamboat Co.*, 38 Conn. 143.

As to what is a usual or suitable wharf, as the place of discharging a vessel, there are numerous decisions turning largely upon local usage. In many instances the consignee may choose a wharf, and so may a majority in interest where two or more consignees are not unanimous. But this right to select a wharf, as against the carrier's own selection, is waived where prompt notice of a particular choice is not given him. *The Boston*, 1 Low. 461, and cases cited; 1 Low. 114. See further, *The Bark Tangier*, 1 Cliff. 396; 5 Myer Fed. Decisions, Carrier, §§ 716-752. There are customs as to delivery by grain-bearing vessels on the great lakes which must be duly regarded. 3 Fed. R. 344; 5 Biss. 371.

¹ *Supra*, § 506; Story Bailm. § 543. And see *Hyde v. Trent Nav. Co.*, 5 T. R. 389, Lord Kenyon, dis.; *Duff v. Budd*, 3 Brod. & B. 177; *Garnett v. Willan*, 5 B. & Ald. 53; *Stephenson v. Hart*, 4 Bing. 476; *Gibson v. Culver*, 17 Wend. 305; *Angell Carriers*, §§ 295-297; 2 Kent. Com. 604, 605.

² Story Bailm. § 543; *Gatliffe v. Bourne*, 3 M. & Gr. 642; *Crawford v. Clark*, 15 Ill. 561; *Price v. Powell*, 3 Comst. 322; *Rome R. v. Sullivan*, 14 Ga. 277; *Michigan Central R. v. Ward*, 2 Mich. 538; *Michigan R. v. Bivens*, 13 Ind. 263.

§ 513. **The same Subject; Conflict of Doctrine as to Railway Carriers.** — Thus, it is now generally conceded that railways, like water carriers, are exempt from the duty of making personal delivery. Yet the responsibility of this comprehensive class of inland carriers is, by the more conservative authorities, held to continue after the goods have reached their destination, and until the consignee has had reasonable time to call for and take them,¹ which would seem naturally to require the carrier to give notice of their arrival.² In Massachusetts, however, and many other important States, the rule is that the usual conduct of railway business does not require notice to be given to the consignee, but that immediate and safe storage in a freight depot on arrival answers as the proper substitute;³ and this, as it is held, even though, before a loss occurs, no reasonable opportunity is given a consignee to take his goods away.⁴ Even in such extreme instances, however, the legal liability of insurer is taken to continue after the transit, until the goods are properly discharged and stored; upon which the company ceases to be a common carrier, and assumes the less hazardous posture of warehouseman.⁵ For careless discharge or negligent storage of the

¹ Alabama, &c. *Rivers R. v. Kidd*, 35 Ala. 209; *Mobile R. v. Prewitt*, 46 Ala. 67; *Moses v. Boston & Maine R.*, 32 N. H. 523; *Winslow v. Vermont, &c. R.*, 42 Vt. 700; *Parker v. Milwaukee R.*, 30 Wis. 689; *Railroad Co. v. Manuf. Co.*, 16 Wall. 318; *Faulkner v. Hart*, 82 N. Y. 413.

² See *Michigan Central R. v. Ward*, 2 Mich. 538; *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442; *Hedges v. Hudson River R.*, 6 Robertson, 120; *Maignan v. New Orleans R.*, 24 La. Ann. 333.

³ *Shaw, C. J.*, in *Norway Plains Co. v. Boston & Maine R.*, 1 Gray, 263; *Thomas v. Boston & Providence R.*, 10 Met. 472; *Bansemmer v. Toledo R.*, 25 Ind. 434; *Francis v. Dubuque R.*, 25 Iowa, 60; *Jackson v. Sacramento Valley R.*, 23 Cal. 268; *McCarty v. New York & Erie R.*, 30 Penn. St. 247; *Neal v. Wilmington R.*, 8 Jones, 452.

⁴ *Rice v. Hart*, 118 Mass. 201. And see *Shepherd v. Bristol R.*, L. R. 3 Ex. 189.

⁵ *Ib.*; *Cahn v. Michigan Central R.*, 71 Ill. 96; *Chicago R. v. Scott*, 42 Ill. 132, per Breese, J.; *Rice v. Boston & Worcester R.*, 98 Mass. 212. And see *Mitchell v. Lancashire R.*, L. R. 10 Q. B. 256 to the point that

chattels carried, so as to subject the owner to special loss or damage, a railway is of course chargeable, whether it be in the one capacity or the other.¹

the requisite diligence of a warehouseman must still be exercised, otherwise the railway is responsible for a loss.

The foregoing decisions show on a most important issue an irreconcilable conflict of authority in leading States where railway traffic is conducted,—a situation greatly to be deplored. The subject may be explored at length by examining the opinion of Cooley, C. J., in *McMillan v. Michigan R.*, 16 Mich. 103; 2 *Redfield Railways*, 5th ed. 77; and counsel briefs, and the opinion of Gray, C. J., in *Rice v. Hart*, 118 Mass. 201.

It is observable that railway usage has been much insisted upon as the reason of the Massachusetts rule. "In short," says Gray, C. J., in *Rice v. Hart*, *supra* (p. 208), "the railroad corporation ceases to be a common carrier and becomes a warehouseman, as matter of law, when it has completed the duty of transportation and assumed the position of warehouseman, as matter of fact, and according to the usages and necessities of the business in which it is engaged." Breese, J., in *Chicago R. v. Scott*, 42 Ill. 132, admits the usage as thus established with evident reluctance.

In *Graves v. Hartford Steamboat Co.*, 38 Conn. 143, 151, Seymour, J., observes: "The rule adopted in Massachusetts has the merit of being definite and of easy application, and may, in many cases, avoid a painful controversy as to what, under the circumstances, is a reasonable time within which the consignee must appear and take his goods. But, on the other hand, that rule puts an end to the carrier's responsibility as such, just where that responsibility is of the highest value to the shipper. Between the deposit of the goods on the platform and their delivery to the consignee, they are exposed to theft, depredation, and injury by

¹ See *Kimball v. Western R.*, 6 Gray, 542; *Rice v. Boston & Worcester R.*, 98 Mass. 212; *Mitchell v. Lancashire R.*, L. R. 10 Q. B. 256; *Cahn v. Michigan Central R.*, 71 Ill. 96; *White v. Colorado R.*, 5 Dillon, 428; *supra*, § 101. Towards goods in their possession merely as warehousemen, railways are not bound to exercise more than ordinary care and diligence. And it is held that where the daily average of goods stored at a freight station is of trifling value, the company is not required to keep a night watchman on the premises. *Pike v. Chicago, &c. R.*, 40 Wis. 583.

Under peculiar circumstances it was held in *Shepherd v. Bristol & Exeter R.*, L. R. 3 Ex. 189, that the carriage liability for cattle transported over a railway ceased when the cattle were put into the carrier's pens. The dissenting opinions in this case impair its usefulness as a precedent.

We should note that it is the reasonable opportunity, rather than technical notice, which those States insist upon where the consignee is most favored as against railway carriers. For, where the consignee's address is not known to the carrier, the consignee or the consignor should take pains to make it plainly understood; and if, after due inquiry, the railway carrier fails to ascertain such address, the notice is excused, and, after a reasonable time for removal has elapsed, the liability of the carrier who has stored the goods will be changed to that of warehouseman.¹ And if the consignee has had reasonable opportunity to remove his goods, but the railway company consents, for mutual convenience, that they may remain longer in the freight house, the presumption arises that the exceptional risk as public carrier exists no longer.²

strangers, and by the carrier's employés." This criticism is perhaps too severe, as though grounded on the misapprehension that a company ceases to be a common carrier before the goods are unloaded and stored, and does not thereafter continue liable on at least the footing of a warehouseman.

In New York the Massachusetts rule is pointedly condemned in a recent case where, certainly, the consignee would otherwise have been put to great hardship. The goods arrived at the railway terminus and were called for, but a delivery was refused until the next day, as it was not convenient to deliver at the time. They were unloaded the same afternoon and placed in the freight depot, but too late for delivery; and during the night the warehouse, with its contents, was destroyed by fire. *Faulkner v. Hart*, 82 N. Y. 413. The court here observes that the decisions of a court of one State upon a question of commercial law are not obligatory upon the courts of other States. A late South Carolina case shows the court divided on this question. 11 S. C. 158. In Texas a statute requires notice to be given to consignees. 49 Tex. 748.

In this collision of State authority, we shall await with interest the opinion of the Supreme Court of the United States on this subject. As to local legislation on this point, see 56 Cal. 484; 49 Tex. 748.

¹ *Pelton v. Rensselaer, &c. R.*, 54 N. Y. 214; *Northrop v. Syracuse R.*, 2 N. Y. Trans. App. 183.

² *Fenner v. Buffalo, &c. R.*, 44 N. Y. 505. In this case, *ib.* p. 511, Earl, Com., thus summarizes the rule of New York on the subject of delivery by railway carriers: "If the consignee is present upon the arrival of the goods, he must take them without unreasonable delay. If

§ 514. **The same Subject; Delivery by Expressmen, etc. —** Expressmen and express companies are generally bound, however, even though they avail themselves of carriage by rail, to make personal delivery; and so, too, with wagoners and teamsters generally; this being their common custom, and, indeed, a chief reason with many for employing the service of such a carrier in these days when one might transmit his goods more cheaply as railway freight, to the same point of destination. Where delivery should be made to the consignee at his place of business, delivery should be during business hours, and with reasonable regard to the safety of the goods, and the consignee's convenience; delivery at the consignee's residence, when proper at all, must be made in a suitable manner, and at a suitable time;¹ and, generally speaking, nothing short of prevention by act of God, or a public enemy, or the conduct of his customer, can excuse an express carrier from actual delivery of the thing to the proper party.² Where the goods are tendered the consignee, and he fails to receive and pay for them, the express carrier may deposit them, or hold them on deposit; and it may be proper to notify the consignor of the situation;³ after which the company will become relieved of its strict responsibility, and hold the goods

he is not present, but lives at or in the immediate vicinity of the place of delivery, the carrier must notify him of the arrival of the goods, and then he has a reasonable time to take and remove them. If he is absent, unknown, or cannot be found, then the carrier can place the goods in its freight house, and, after keeping them a reasonable time, if the consignee does not call for them, its liability as a common carrier ceases. If, after the arrival of the goods, the consignee has a reasonable opportunity to remove them, and does not, he cannot hold the carrier as an insurer. The carrier's liability thus applied and limited, I believe will be found consonant with public policy, and sufficiently convenient and practicable." See also *Chalk v. Charlotte R.*, 85 N. C. 423.

¹ *Merwin v. Butler*, 17 Conn. 138; *Marshall v. American Express Co.*, 7 Wis. 1; *Baldwin v. American Express Co.*, 23 Ill. 197; *Haslam v. Adams Express Co.*, 6 Bosw. 235.

² *American Merchants' Union Express Co. v. Wolf*, 79 Ill. 430.

³ Cf. § 501.

subject to the consignor's or true owner's order; bound, like a gratuitous bailee, only to take slight care of them, save where custom or contract gives him compensation for the special trouble.¹

Personal delivery dispenses with personal notice and affording reasonable opportunity to remove the goods; which otherwise, in localities where business usage, the character of the goods, and the sender's knowledge and assent, might justify an express company in non-delivery, the law will insist upon.² Packages of moderate value may commonly be delivered to the consignee's clerks, or subordinates about his premises; but the express carrier should, with greater caution, scrutinize credentials of authority to receive on behalf of a consignee, where he knows the thing is of considerable worth, and his trust an important one.³

§ 515. **Carrier's Obligation to make Personal Delivery affected by Circumstances, Contract, etc.** — The obligation of a carrier to make personal delivery may be confirmed by special circumstances. Thus, a railway company may extend its patronage to certain carters and teamsters at its terminus, in cases where consignees do not send their own teams; and yet, having no interest in the profits, assume no duty of delivering at a consignee's door; but if the company should exact the payment of cartage in advance, this would amount to an express undertaking to deliver to the consignee in person, and the common carriage risk would extend accordingly.⁴ So there may be an express undertaking, on the carrier's part, to give the consignee notice when his goods have arrived.⁵

¹ 79 Ill. 430; *Kremer v. Southern Express Co.*, 1 Coldw. 356; *Marshall v. American Express Co.*, 7 Wis. 1; *Witbeck v. Holland*, 45 N. Y. 13.

² See *Baldwin v. American Express Co.*, 23 Ill. 197; *Packard v. Earle*, 113 Mass. 280; *Sullivan v. Thompson*, 99 Mass. 259.

³ See *Sullivan v. Thompson*, 99 Mass. 259.

⁴ *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *Cahn v. Michigan, &c. R.*, 71 Ill. 96.

⁵ In *Tanner v. Oil Creek R.*, 53 Penn. St. 411, it is held that the

In general, a special custom mutually understood, or special contract, may, if reasonable and just, vary the common rule of the particular vocation, in respect of the place or mode of making delivery.¹

§ 516. **Responsibility as Warehouseman further considered.** — As we have seen, a carrier may become himself the warehouseman or depositary of goods left upon his hands after his transportation duty terminates;² or he may constitute some responsible third party the warehouseman.³ In the latter case, the nature of the carrier's delivery must determine on whose behalf it is made; for, if the consignee fails, after reasonable opportunity, to take the goods, the carrier has his election to make the third party his own agent, for whose negligence he shall stand responsible, or to divest himself of such risks by making such third party agent of the owner.⁴

Where the carrier himself becomes warehouseman of the goods, personally or by his own agent, it is of importance to note whether the transportation duty has ended, or not, upon the principles already discussed. For, in the one case, he remains no longer chargeable as insurer, and under the carriage contract, but must, for loss or injury occasioned while acting in this new capacity, be held answerable only as would any other ordinary bailee for hire, supposing the bailment to be with intended recompense, or as a gratuitous bailee, if the trust be without recompense.⁵ In the other case, however, and where

freight-agent may bind a railway company by his promise to give notice of the goods' arrival.

¹ See §§ 519, 520, *post*.

² *Supra*, § 500.

³ *Ib*.

⁴ *Great Northern R. v. Swaffield*, L. R. 9 Ex. 132; *Bickford v. Metropolitan Steamship Co.*, 109 Mass. 151; *Hamilton v. Nickerson*, 11 Allen, 308; *Hathorn v. Ely*, 28 N. Y. 78, 81. See *Alabama R. v. Kidd*, 35 Ala. 209, where the contract was to deliver to the carrier's own agent.

⁵ *Story Bailm.* § 446; *Garside v. Trent Nav. Co.*, 4 T. R. 581; *Shepherd v. Bristol R.*, L. R. 3 Ex. 189; *Thomas v. Boston & Providence R.*, 10 Met. 472; *Smith v. Nashua R.*, 7 Fost. 91; *Norway Plains Co. v. Bos-*

the transportation duty has not been fully performed, his liability is essentially that of common carrier, or such as makes the bailee answerable at the common law for losses by rioters, accidental fires, and the like ; which rule must further apply where the carrier deposits the goods at some intermediate place on his route,¹ or has carried them carelessly out of the way, or, after their arrival at the point of destination, holds them still, without having as yet given the notice or reasonable opportunity of removal, or made the personal delivery which was incumbent upon him.²

§ 517. **Responsibility of Carrier to forward beyond his Route; Connecting Carriers.** — In other respects the carriage and delivery of goods as a common carrier will be found associated with further duties towards the property. A carrier may be at the same time a forwarder for a particular undertaking ; possibly, too, a wharfinger or warehouseman, besides ; and here the point at which performance ceases in one capacity and begins in the other is of consequence in determining the changing character of his risks. Completing his own carriage duty, and holding as warehouseman or wharfinger, to await the owner's orders, before the goods are put upon their next course, the position of this party is that of an ordinary bailee for hire.³ So, if as forwarder, the carrier, on arrival of the goods at the termination of his own route, puts them into a

ton & Maine R., 1 Gray, 263; *Hall v. Boston & Worcester R.*, 14 Allen, 444; *Francis v. Dubuque R.*, 25 Iowa, 60; *Neal v. Wilmington R.*, 8 Jones (N. C.), 462; *Bansemmer v. Toledo R.*, 25 Ind. 434; *Jackson v. Sacramento Valley R.*, 23 Cal. 268. We have already seen that our States rule differently as to the exact point at which the railway carrier divests himself of his responsibility as such, and becomes a warehouseman. *Supra*, § 513.

¹ *Forward v. Pittard*, 1 T. R. 27; *Story Bailm.* §§ 447, 536.

² *Hyde v. Trent Nav. Co.*, 5 T. R. 389; *White v. Humphery*, 11 Q. B. 45; *Hemphill v. Chenie*, 6 W. & S. 62; cases, *supra*, § 513.

³ *Roskell v. Waterhouse*, 2 Stark. 461; *Platt v. Hibbard*, 7 Cow. 497; *Goold v. Chapin*, 10 Barb. 616; *Angell Carriers*, § 134; *Story Bailm.* § 449.

proper vehicle for their further conveyance, having no interest therein, he discharges his own carriage duty completely, and is not responsible for their subsequent loss.¹

The modern expansion of our inland transportation system, whereby goods are carried in a continuous line to distant points by means of successive carriers, has given rise to some delicate and perplexing questions before English and American tribunals, concerning the point at which a particular carrier's liability shall terminate, while the goods are taking their onward course. In one case a carrier may have undertaken a through transportation over other lines to a given terminus, on his strict responsibility; while in another his engagement may be that of a mere forwarder for the customer beyond his own route.²

§ 518. **Carrier's Duty of making Proper Delivery where receiving from another Carrier.** — In general, we may add, the carrier's duty of making proper delivery, without unreasonable delay either before or after his arrival, is the same, whether he received the property directly from the consignor, or from some other carrier to whom it was originally bailed.³

§ 519. **Usage, Special Contract, or Legislation affecting Delivery.** — Usage, special contract, or legislation may affect the common carrier's obligation of delivery, as it often does the transportation undertaking in other respects.⁴ This the drift of the present chapter has already indicated.

As to the first point, dark allusions are not unfrequently made by courts of this day to the force of custom and usage in justification of what might otherwise be pronounced a positive variance of authorities. Usage dispenses with personal delivery by ships and railway carriers.⁵ Usage of railways has

¹ Story Bailm. §§ 448, 538; *Ackley v. Kellogg*, 8 Cow. 223; *Garside v. Trent Nav. Co.*, 4 T. R. 581.

² See c. 9, *post*, as to delivery by connecting carriers.

³ *Gulliver v. Adams Express Co.*, 38 Ill. 503.

⁴ *Supra*, c. 5.

⁵ *Supra*, § 506.

been strongly alleged by some courts as a ground for relieving such carriers from the obligation of giving notice;¹ and strongly, too, has usage been upheld as the reason for treating various other classes of carriers with less favor.²

We may here observe generally that, while the *prima facie* obligation of a carrier, with regard to delivery, may be affected by a well-established usage generally understood, so uniformly and so long ought the usage to have been acquiesced in by the public that a jury would feel constrained to say that it entered into the minds of the contracting parties as part of the contract.³ Yet it suffices that a carrier does his business according to the regular, known, and ordinary modes, or, if the other

¹ *Supra*, § 513. And see 83 Mo. 112.

² *Supra*, § 514.

Usage of the port is often set up to justify the peculiar method of delivering from a vessel. See 87 N. Y. 240, as to the designation of an elevator by the consignee. See also §§ 511, 515, *supra*; 3 Wall. 225. Whether carriers by inland waters may divest themselves of responsibility like carriers by sea or not, usage long established, uniform, and well known may regulate the mode of delivery. *The Richmond*, 1 Biss. 49; Abb. Adm. 209. Where a bill of lading is silent as to the particular place or mode of delivery, the usage and regulations of the port or the arrangements made with the consignee should determine; but it is the custom of the particular port, and not of other ports, which governs. 10 Fed. R. 779; 2 Am. L. Reg. n. s. 287. Delivery to the wrong elevator, or at the wrong wharf, is, in such cases, a misdelivery.

For a local usage of railroads to deliver under a bill of lading not containing the words "or order," without requiring production of the document, see 133 Mass. 154. Usage in some of our sparsely settled regions to deliver goods by water at a landing-place where there is neither warehouse nor agent to keep custody, binds customers who are aware of it. 4 McCrary, 383. And *Turner v. Huff*, 46 Ark. 222, affirms the usage, even as against customers not aware of it. And so is it with the custom of delivering by railway at a side track and there leaving the car and its contents for the consignee, the company having neither depot nor station-agent at that point. 66 Ala. 167. Those who do business with the carrier upon such conditions are bound to look after their property when it arrives.

³ *Rushforth v. Hadfield*, 6 East, 519; *Alabama Rivers R. v. Kidd*, 35 Ala. 209; *Cahn v. Michigan Central R.*, 71 Ill. 96; *Angell Carriers*, § 301; *Story Bailm.* § 543.

party understood it, his own particular modes; and the carrier need not prove that his consignor understood an established usage, for the usage explains itself.¹ As to delivery, which peculiarly concerns the local terminus, and not so much a consignor as the consignee, the course of business at the place of destination may control concerning the proper time, place, and manner of discharging the carrier's duty.² But usage or custom cannot prescribe that acts which the law declares to be a delivery shall not sufficiently constitute it,³ or otherwise overturn what public policy sets up; and, where delivery according to usage becomes from special circumstances unsuitable, the carrier cannot so discharge himself.⁴

§ 520. **The same Subject.**—Special contract may regulate the time, place, and manner of delivery, and, as we have incidentally shown, affect very considerably the common carrier's obligation in this and other respects, by stringent or lax provisions; though not, as it appears, to the extent, in America at least, of permitting persons of this profession to stand toward their customers with lesser burdens, under the most favorable aspect, than are sustained by private bailees for hire.⁵

Special terms, relative to delivery and the mode of terminating the carrier's responsibility, must, if reasonable of

¹ See *St. John v. Van Santvoord*, 25 Wend. 660; *Farmers', &c. Bank v. Champlain Trans. Co.*, 16 Vt. 52; s. c. 18 Vt. 131; s. c. 23 Vt. 186; *Loveland v. Burke*, 120 Mass. 139, per Ames, J.

² 1b. And see *Barnes v. Foley*, 5 Burr. 2711. It has been held that a carrier may show usage to deliver at certain stopping-places only. See *McMasters v. Penn. R.*, 69 Penn. St. 374.

³ *Reed v. Richardson*, 98 Mass. 216.

⁴ *Stone v. Rice*, 58 Ala. 95.

⁵ See *supra*, § 454. In case of a refusal to deliver to the consignee under a mistaken belief that freight has not been paid, a special stipulation against liability for "detention" does not protect the carrier. *Gordon v. Great Western R.*, 8 Q. B. D. 44. Nor, in general, are contract terms, by way of reducing liability, which relate to the transit, to be extended by construction to negligence or misconduct affecting the goods after their arrival.

themselves, prevail over local usage as well as common law ;¹ and the common carrier's performance should in general be in accordance with his engagement ;² which, as modern transportation is conducted, is quite commonly to be gathered from the expressions used in the bill of lading, way-bill, or receipt given for the goods, to which the shipper has actually or by legal inference assented.³

§ 521. **The same Subject.** — Legislation, too, may be found affecting the local operation of the rules we have considered ; and it might well be employed more extensively to eradicate some of the more glaring inconsistencies of our law touching the delivery obligation of railway and other carriers, and the method of terminating the present relation when the goods have reached their journey's end.⁴ Some local statutes, in fact, may be found which specify the course to be pursued by railways in delivering freight ;⁵ and various legislative

¹ *Myrick v. Michigan R.*, 7 Reporter, 229.

² A carrier may thus bind himself to transport and deliver without a change of cars. *Stewart v. Merchants' Trans. Co.*, 47 Iowa, 229. Or to deposit in warehouse at the consignee's risk and expense unless the goods are promptly taken. *Thomson v. Liverpool, &c. Steam Co.*, 44 N. Y. Super. 407.

³ *Supra*, §§ 464, 511. The principles set forth in the preceding chapter as to the requirement of mutual assent and reasonableness of interpretation apply to terms qualifying the duty of delivery as well as to other terms of carriage performance. See *Ayres v. Western R.*, 14 Blatchf. 9. An agreement to allow goods to remain in a carrier's custody for ninety days after their arrival without extra charge, does not fairly import that the carrier consents to be held as insurer for so long a period. *Hathorn v. Ely*, 28 N. Y. 78. On the other hand, negligent delay and deviation, or mis-delivery or misconduct or careless delivery, should not be excused under the color of special terms of carriage. *Supra*, §§ 488, 489 ; 68 Ga. 805 ; *Dibble v. Morgan*, 3 Ben. 276. And see *Wise v. Great Western R.*, 1 H. & N. 63 ; *Mitchell v. Lancashire R.*, L. R. 10 Q. B. 256 ; *Bank of Commerce v. Bissell*, 72 N. Y. 615 ; *Toledo, &c. R. v. Merri-man*, 52 Ill. 123 ; *Bancroft v. Merchants' Desp. Trans. Co.*, 47 Iowa, 262.

⁴ See *supra*, §§ 481-486, 513.

⁵ *Houston R. v. Adams*, 49 Tex. 748. A New York statute forbids the delivery by a common carrier of property covered by a bill of lading

provisions, carefully framed, now abound, which authorize the sale of unclaimed property by certain classes of common carriers.

except on surrender of the bill, unless the words "not negotiable" are on the face of the document. 102 N. Y. 120.

For legislation concerning the manner of unloading live-stock, etc., see 15 Fed. R. 209; U. S. Rev. Sts. §§ 4386, 4390.

¹ See Mass. Pub. Stats. (1882) c. 96. And see next c.

CHAPTER VII.

GENERAL RIGHTS OF COMMON CARRIERS.

§ 522. **General Rights of Carrier stated.** — The general rights of the common carrier which remain for our consideration are: I. His special property in the goods and chattels during the accomplishment of the bailment purpose. II. His right of compensation, with or without the incidental security of a lien.

§ 523. **Carrier's Special Property in the Thing; Right of Action.** — I. As to the common carrier's special property in the goods and chattels during the accomplishment of the bailment purpose. In conformity with the general doctrines of mutual-benefit bailments, every common carrier is invested with a special property in the goods and chattels which a customer confides to him, so that he may maintain an action against any and all persons who disturb his possession thereof and injuriously interfere with the performance of his lawful duties. He may thus replevy the thing from a stranger, or sue in trover for the conversion.¹ He may likewise recover in many general instances from his sub-contractors, whose delinquency occasions an injury or loss for which he must personally respond; as where one company has transported, on behalf of itself as the principal and responsible party on a connecting line, and a connecting company occasions the loss.² The general reason of this right of action in the common

¹ Bac. Abr. Contract C.; Roll. Abr. 5; Angell Carriers, § 348; Gosling v. Higgins, 1 Camp. 451, per Lord Ellenborough. The carrier's recovery of full damages against the wrong-doer will bar the owner. *Steamboat Farmer v. Macrow*, 26 Ala. 189.

² *Chicago, &c. R. v. Northern Line Packet Co.*, 70 Ill. 217; *Smith v. Foran*, 43 Conn. 124; *post*, c. 9.

carrier's behalf is that, as bailee, he must answer over to the bailor or owner for the whole property committed to him ;¹ and this is reinforced, in instances like the present, by the consideration that he commonly has a special interest in the particular goods or chattels, as security for his recompense.² So ample, therefore, is the remedy afforded the carrier, that, as against trespassers, he has been allowed to recover, in damages, the full value of the goods.³

§ 524. **The same Subject.** — The carrier, too, as a principal bailee who employs his own subordinates in the performance of an undertaking, is entitled to sue his servant, sub-contractor, connecting carrier, or other subordinate, by virtue of his own responsibility over to the owner for their acts, and the circumstance that he has employed them, whenever any such party stands chargeable with a breach of contract made with him.⁴

§ 525. **Carrier's Right of Compensation.** — II. As to the common carrier's right of compensation, with or without the incidental security of a lien. We have shown, in a previous chapter, that the carrier's right of recompense for his trouble is so highly favored at our law that one may refuse, in the exercise of his public vocation, to transport goods and chattels for any customer, unless first paid his reasonable reward

¹ *Supra*, §§ 22, 54, 115.

² *Supra*, § 122.

³ *Campbell v. Conner*, 70 N. Y. 424. This was the case of an unlawful seizure by a sheriff, who attached without first giving indemnity as the law required.

But since the owner of chattels is not divested of his property (except in certain cases where negotiable instruments come to the hands of a *bona fide* party for value) by their fraudulent or larcenous taking, and the transferee's possession, however innocently acquired, does not impair the right of the true owner to pursue and take them, a carrier stands in no better situation than any other bailee or transferee of a wrong-doer, but must surrender to the true owner whose conduct has not estopped him to assert his claim. *Supra*, § 494.

⁴ *Deford v. Seinour*, 1 Ind. 532; *White v. Bascom*, 28 Vt. 268. And see *Chicago, &c. R. v. Northern Line Packet Co.*, 70 Ill. 217; *Smith v. Foran*, 43 Conn. 124; *supra*, § 108.

for the service.¹ More commonly, however, is this reward claimed by him at the journey's end as a condition precedent of surrendering the property to the consignee.

Where common carriers receive goods in the ordinary course of business, to be transported from one place to another, they may expressly stipulate for any reward which, of itself, is not extortionate, oppressive, or to the special disfavor of individuals;² but in the absence of express stipulation, the law implies that the usual and customary compensation shall be paid.³

§ 526. **Recompense, how denoted; Freight.** — Recompense for the carriage of goods and chattels on a large scale is usually denominated "freight," — a word which, originating in maritime law, was once restricted to conveyance by water, but now applies as well to inland transportation, though more especially to that by railway.⁴ But other words are used with more particular reference to the lesser carriers; such as "charges," "reward," "hire money," "fare;" this last word applying rather to passengers and their baggage, than to the general conveyance of goods and chattels.

§ 527. **When Freight begins; Removal of Goods placed on Board.** — The consignor of goods, who has once completely delivered them to the carrier, has no right to demand them again, and break or prevent their transit, regardless of the carrier's just indemnity; nor would he, by altogether refusing to deliver them according to the contract of transportation, absolve himself from making compensation in damages for his breach of engagement. And the approved rule as to carriage by a general ship, extending, perhaps, to other modes of

¹ *Supra*, § 373.

² *Supra*, §§ 373-376. And see *Angell Carriers*, § 392.

³ *Ib.* Nor ought reasonable rates to be reckoned without reference to the carrier's limitations by special contract. *Holford v. Adams*, 2 Duer, 471.

⁴ See *Bouv. Dict.* "Freight;" *Worcester*, *ib.*; *Story Bailm.* § 587; *Angell Carriers*, §§ 391, 392; *Brittan v. Barnaby*, 21 How. 527.

conveyance by land or water, is that one who has laden goods cannot insist on having them relanded and delivered to him without paying the freight that might become due for carrying them, and indemnifying the master against the consequences of signing a bill of lading.¹ But, as regards the question, when lien attaches to the goods, and the earning of freight, as such, commences, authorities are not uniform. The modern English rule, of which some American authorities approve, regards the freight as being earned, and the lien therefor as attaching from the time the goods are once delivered, and accepted by the carrier; which acceptance would quite commonly date from the delivery of a bill of lading.² But other decisions in this country decline to recognize any right in the carrier by sea to recover full freight, or to avail himself of the lien security, before he has broken ground for the voyage; whereby the consignor's earlier removal of the goods he has delivered would entitle the carrier only to sue for his proper indemnity, as under any breach of contract.³

§ 528. **Recompense where Goods are intercepted by Owner.**—If the consignee or owner demands and receives the goods before they reach their final destination,⁴ he is liable for the full freight or recompense, provided the carrier was ready to

¹ *Thomson v. Trail*, 2 C. & P. 334, per Lord Tenterden; *Tindal v. Taylor*, 4 E. & B. 219, 227, per Lord Campbell, C. J.; *Angell Carriers*, § 393.

² *Tindal v. Taylor*, 4 E. & B. 219; *Thompson v. Small*, 1 C. B. 328; *Bartlett v. Carnley*, 6 Duer, 194.

³ *Bailey v. Damon*, 5 Gray, 92. And see *Burgess v. Gun*, 3 Har. & J. 225; *Curling v. Long*, 1 B. & P. 636. Such a construction of the carrier's indemnity leaves it open to consider how the carrier might, by availing himself of his proper opportunities, have substituted other freight and mitigated his loss.

When this question arises for application to railway cars, it will be found to present a different aspect from that of carriage by a single vehicle, because of the circumstance that freight cars are attached or left off from a train, according to the nature and amount of personal property requiring present transportation.

⁴ See *supra*, § 505.

deliver at their ultimate destination, and does not consent to an abatement of his charges.¹ But where acceptance is made short of the place originally agreed upon, and the mutual understanding appears to justify the supposition that the carrier abates his charges, then the carrier will be entitled only to *pro rata* compensation;² which would be the general result of an acceptance where the transit, from some cause exonerating the carrier from liability, was broken up or seriously interrupted.³

If, however, the consignee or owner intercepts and takes his goods because of the carrier's tortious conduct, or his inexcusable refusal to complete the transit according to his contract, the carrier earns no freight at all.⁴ And wherever the carrier inexcusably loses the goods on the way, or they are wrongly delivered, or other act is done which the law visits upon the carrier, rendering their delivery impracticable, he has no right as such to receive freight for their carriage.⁵

§ 529. **Rule of full Freight or none considered.** — Indeed, the rule which has long been asserted of carriage by water under a bill of lading is that the contract of transportation is an entire one, so that the carrier can recover no compensation unless he fulfils his engagement by making a complete transit and complete delivery.⁶ But to thus permit the customer to

¹ *Violett v. Stettinius*, 5 Cranch C. Ct. 559.

² U. S. Dig., 1st Series, Carriers, 420; *Lorent v. Kentring*, 1 Nott & M. 132; *Portland Bank v. Stubbs*, 6 Mass. 422, 427; *Parsons v. Hardy*, 14 Wend. 215; *Hunt v. Haskell*, 24 Me. 339.

³ *Ib.*

⁴ See *Parsons, C. J.*, in *Portland Bank v. Stubbs*, 6 Mass. 422, 427.

⁵ *Ferguson v. Cappeau*, 6 Har. & J. 400; *Sayward v. Stevens*, 3 Gray, 97; *Mason v. Lickbarrow*, 1 H. Bl. 359.

⁶ *Ship Nathaniel Hooper*, 3 Sumn. 542, 550, and cases cited; *Angell Carriers*, 5th ed., § 398, and *Lathrop's note*; *Sayward v. Stevens*, 3 Gray, 97. The convenience with which the consignee may supply the deficiency is held not to better the carrier's claim for compensation. *Sayward v. Stevens*, *ib.*

No freight is due, whether full or *pro rata* (under the rule of the text), where a vessel has been captured and condemned with its cargo at an

derive an advantage at the carrier's expense seems unnecessarily harsh, and such a rule discourages the carrier from doing his best where calamity occurs.

This doctrine, which probably originated out of regard for the peculiar incidents and responsibilities attending ocean navigation and the carriage of cargoes, where the presumption is a fair one that intermediate delivery must be immensely inconvenient to an importing merchant, applies with less force to land transit and small consignments; since here, to a much greater extent, one carrier may forward what another has left, and the owner, by telegram or otherwise, adapt his course to the emergency, so as to reduce the mischief which disaster occasions. Even in water carriage, the courts have broken the force of the rule to some extent, by paying fair heed to the mutual understanding of the parties, as their express contract, acts, or general conduct make it manifest. Thus, not only may an intermediate or partial acceptance by the shipper or consignee be construed into a waiver, on his part, of full performance by the carrier, and a new mutual agreement for a *pro rata* compensation,¹ but, under the original contract itself, the idea of allowing full freight or nothing may be excluded, to a just and reasonable extent.² Moreover the fault of the customer shall not deprive the carrier of his recompense; nor shall temporary stress or delay amount to a breaking up of the transit.³

§ 530. **The same Subject.** — Thus, where the carriage contract is not for a gross sum, nor relates to miscellaneous

intermediate port, though part of the cargo is restored and sold at the same port. *Sampayo v. Salter*, 1 Mason, 43. Nor generally in case of a compulsory sale at an intermediate port by reason of the disaster. 3 Ware, 139; Abb. Adm. 490. No freight is earned against the shipper where delivery has become impossible. 4 Blatchf. 443.

¹ *Supra*, § 528; *Ship Nathaniel Hooper*. 3 Sumn. 542; Bigelow, C. J., in *Sayward v. Stevens*, 3 Gray, 97, 104; 2 McL. 422.

² 2 McL. 422.

³ 4 Biss. 417; 5 Duer, 538.

goods, unlike in kind or value, and bearing no definite proportion to one another, but is apparently designed to make compensation for the carriage divisible and apportionable, such a contract will be enforced according to its intent; as, where the freight is stipulated as payable by weight or measurement, or where different portions of the same consignment are upon distinct and separate terms as to freight.¹ Full freight is due where the loss, as under a consignment in leaky barrels, is owing to the consignor's fault,² or where the consignee prevents due delivery from being made.³ Where, too, a common carrier pays damages for the loss of goods by his breach of contract, this is now regarded as tantamount to a safe delivery in many instances, so as to entitle him to the allowance of his freight thereon.⁴ And if, from some cause which would clearly excuse a total delivery, as, for example, where part of the goods consigned were destroyed by lightning, without the carrier's fault, or perished from natural decay, the carrier makes delivery of a portion only, courts incline to allow him freight *pro rata* for the portion safely delivered.⁵

The universal rule, however, as to what may have been actually lost in transit, is, in the absence of some special usage or contract to the contrary, that, provided neither

¹ *Ritchie v. Atkinson*, 10 East, 295; *Sayward v. Stevens*, 3 Gray, 97, 103. As to computing payment by weight, etc., see 6 Ben. 199.

² *Nelson v. Stephenson*, 5 Duer, 538; 4 Biss. 417.

³ *Angell Carriers*, § 400; 2 McL. 422.

It appears that where a landing of the goods is prevented by the government officials, without the carrier's fault, freight is nevertheless earned. *Morgan v. North Am. Ins. Co.*, 4 Dall. 455. See *Howland v. Greenway*; 22 How. 491. But it is otherwise with a seizure caused by the carrier's wrong. *Elwell v. Skiddy*, 15 N. Y. Supr. 73.

⁴ *Hammond v. McClures*, 1 Bay, 101; *Atkisson v. Steamboat Castle Garden*, 28 Mo. 124. And see *Hagerstown Bank v. Adams Express Co.*, 45 Penn. St. 419. But cf. *Stevens v. Sayward*, 8 Gray, 215, where there was no acceptance of the residue by the consignee.

⁵ *Price v. Hartshorn*, 44 Barb. 655; *The Brig Collenberg*, 1 Black, 170.

owner nor carrier was in default, and saving, of course, the carrier's common-law risks as an insurer, the goods must perish to the one and the freight to the other.¹ Nor is a special contract which throws risks of loss upon the owner readily assumed to make him pay freight upon what is lost besides.²

§ 531. **Freight where Delivery is incomplete.**—Where, once more, a carrier, after making a partial delivery, unlawfully withholds delivery of the residue, and the consignee thereupon replevies them, freight may be recovered on the portion already delivered, and also on such portion as may afterwards arrive and be taken by the officer and delivered to the consignee after the beginning of the service of the replevin, there being, as to all this, no demand and refusal; but as to that portion the possession of which was obtained

¹ *Ib.* Cf. as to ordinary mutual-benefit bailees, *supra*, § 111. And see *Tirrell v. Gage*, 4 Allen, 245.

As to the commercial apportionment of freight, and the circumstances under which it may be claimed, see further, *Angell Carriers*, 5th ed., §§ 399–408, and *Lathrop's notes*. Capture involves a loss of freight; but a recapture and performance of the voyage revives the right. *Angell Carriers*, § 401. Transshipment after disaster may keep the right of freight alive. *Angell Carriers*, §§ 402, 403. But this must be deemed affected by a consideration of the carrier's duty in this respect. See *supra*, §§ 401–404; *Crawford v. Williams*, 1 Sneed, 205; *Hopper v. Burness*, 1 C. P. D. 137.

When goods are shipped and the vessel is wrecked, and the shipper abandons the cargo to the insurers, who accept the abandonment, and take possession of the goods against the wishes of the owners of the vessel, who are ready to send the goods on, this renders the shipper liable for freight *pro rata*. *McKibbin v. Peck*, 39 N. Y. 262. Cf. *Atlantic Ins. Co. v. Bird*, 2 Bosw. 195. For circumstances deemed insufficient to constitute abandonment and a loss of freight, see *Hughes v. Sun Ins. Co.*, 2 N. E. 901.

The justifiable conduct of the carrier, and his readiness to perform his full engagement so as to benefit the shipper, seems properly to be taken in his favor in all such cases, while his default, or a determination to earn freight regardless of the shipper's interests under an emergency, is taken against him.

² *N. Y. Central R. v. Standard Oil Co.*, 87 N. Y. 486.

only by replevin, the carrier cannot, as it appears, recover freight.¹

§ 532. **Recompense paid in Advance recovered if not earned.** — In the absence of any special agreement to the contrary, the payment of freight or recompense in advance may be recovered back if it is not actually earned; that is to say, in general, unless the carriage has been fully performed consistently with the carrier's undertaking.²

§ 533. **Recompense under Bill of Lading or Special Contract.** — The understanding of the parties in respect of the carriage compensation is quite commonly, however, to be gathered from the language employed in the bill of lading or other contract of affreightment or carriage. The carrier, or the party from whom freight or recompense is claimed, may show, on his behalf, that the actual cargo was different from that described in the bill of lading, the receipt being open to explanation;³ and thus the carrier may be found entitled to more or less compensation than there appears.⁴ The rule is, that though goods should swell or shrink naturally on the transit, so as to weigh more or less at the terminus than when taken on board, this will not affect the right of *pro rata* compensation; since this is due only on the amount which is actually shipped;⁵ but the special engagement serves as the standard for special cases.⁶

¹ *Boston & Maine R. v. Brown*, 15 Gray, 223. The actual decision is, that such freight cannot be recovered in an action commenced while the replevin suit was pending.

² *Manfield v. Maitland*, 4 B & Ald. 582; *Minturn v. Warren Ins. Co.*, 2 Allen, 86, and cases cited; *Chase v. Alliance Ins. Co.*, 9 Allen, 311. See § 533.

³ *Blanchet v. Powell's Colliery Co.*, L. R. 9 Ex. 74; *The Schooner Treasurer*, 1 Sprague, 473.

⁴ *Allen v. Bates*, 1 Hilt. 221; *Nelson v. Stephenson*, 5 Duer, 538.

⁵ *Gibson v. Sturge*, 10 Ex. 622.

⁶ See, as to the recent construction of certain expressions in this respect, *Buckle v. Knoop*, L. R. 2 Ex. 125; L. R. 2 Ex. 333; *Conlthurst v. Sweet*, L. R. 1 C. P. 649; *Tully v. Terry*, L. R. 8 C. P. 679; *Robinson v. Knight*,

Of the general rule,¹ Bigelow, C. J., observes, in a leading case on this subject, that it "may be varied or annulled by an express agreement in the charter-party or bill of lading, by which it is provided that money paid in advance on account of the freight shall be deemed to be absolutely due to the [ship] owner [or carrier] at the time of its prepayment, and not in any degree dependent on the contingencies of the performance of the contemplated voyage and the entire fulfilment of the contract of carriage."² But, as such a stipulation is intended to control the usual law applicable to such contracts, and to substitute in its place a positive agreement of the parties, it is necessary to express it in terms so clear and unambiguous as to leave no doubt that such was the intention in framing the contract of affreightment. Otherwise, the general rule of law must prevail."³ Reduced rates might furnish a consideration for an absolute payment in advance and the assumption of risks of loss besides.⁴

§ 534. **Consignee in General liable for Freight; his Cross-Action for Damages.**—The consignee or proper party receiving the goods is in general responsible for their freight: "the only discrepancy between the decisions being," as one of our American judges remarks, "whether the damages from injury to, or non-delivery of, the goods, are to be recovered by a separate action or by recoupment from the freight earned."⁵ In England it was early decided that, if the consignee of goods

L. R. 8 C. P. 465; *Duthie v. Hilton*, L. R. 4 C. P. 138; *Merchant Shipping Co. v. Armitage*, L. R. 9 Q. B. 99.

¹ See § 532.

² *De Silvale v. Kendall*, 4 M. & S. 37; *Jackson v. Isaacs*, 3 H. & N. 405; *Hicks v. Shield*, 7 El. & B. 633.

³ Bigelow, C. J., in *Beuner v. Equitable Safety Ins. Co.*, 6 Allen, 222, 224. This issue is raised in cases where insurance is made upon the freight. See *Lawson v. Worms*, 6 Cal. 365; *Atwell v. Miller*, 11 Md. 348; 12 Fed. R. 77. That recompense may be otherwise varied by special contract, see *supra*, § 529.

⁴ 12 Fed. R. 77.

⁵ *Appleton, J.*, in *Hill v. Leadbetter*, 42 Me. 572, 576.

received any benefit from their carriage, he could not defend himself from the payment of freight on the ground that the goods had been inexcusably damaged by the carrier to an amount exceeding the freight, but should bring his cross-action.¹ But the modern inclination, and especially in this country, seems to be to allow the injury or partial loss occasioned by the negligence of the carrier to be set off *pro tanto* against his claim for compensation, even though it be to extinguish such claim altogether.²

§ 535. **Consignor is originally liable for Freight or Recompense.** — Independently, however, of an acceptance at the end of the transit, it is the consignor or shipper who is ordinarily bound to pay the freight or recompense on the goods whose transportation he procures, and thus may the carrier doubtless regard him when they are offered for transportation.³ But whenever the consignee engages to make payment, he, too, may be held responsible accordingly. The tenor of bills of lading and similar documents of title and transportation, and the conduct of the transferees of such instruments, may aid the carrier in fixing the liability to himself or others, for whose benefit the transportation was conducted;⁴ and the receipt of goods unpaid for by the consignee or proper party usually imports a promise on the part of such consignee to stand responsible for what, on the whole, may be the carrier's rightful charges.⁵

¹ *Shields v. Davis*, 6 Taunt. 65; *Ritchie v. Atkinson*, 10 East, 295.

² *Sedgw. Damages*, 451; *Hinsdell v. Weed*, 5 Denio, 172; *Boggs v. Martin*, 3 B. Mon. 239; *Kaskaskia Bridge Co. v. Shannon*, 1 Gilm. 15; *Bancroft v. Peters*, 4 Mich. 519; *Hill v. Leadbetter*, 42 Me. 572; *Leech v. Baldwin*, 5 Watts, 446; *Edwards v. Todd*, 1 Scammon, 462; *Fitchburg R. v. Hanna*, 6 Gray, 539; *Dyer v. Grand Trunk R.*, 42 Vt. 441; *La Motte v. Angel*, 1 Hawaiian, 136, per Lee. C. J. And see c. 8, *post*.

³ *Abb. Shipp.* p. 3, c. 7, § 4, 5th ed.; *Shepard v. De Bernales*, 13 East, 565; *Christy v. Row*, 1 Taunt. 300; *Story Bailm.* § 589; *Holt v. Westcott*, 43 Me. 445; *Wooster v. Tarr*, 8 Allen, 271.

⁴ *Ib.*

⁵ *Story Bailm.* § 589; *Hill v. Leadbetter*, 42 Me. 572; 3 Ben. 39.

§ 536. **Liability for Recompense under a Bill of Lading.** — So strongly do the courts now regard the consignor of property for transportation as originally liable for the carrier's compensation, that the shipper named in a bill of lading may commonly be sued by the carrier for his remuneration, even though he was not the true owner thereof, provided the carrier has seen fit to waive his right of lien and to deliver the goods without receiving payment of the carriage dues.¹ And the clause customarily inserted in bills of lading, directing payment of freight by the consignee or his assigns, is, by the current of English and American authorities, intended only for the benefit of the carrier; so that, if he delivers without receiving such payment, he may recover of the consignor instead.² But where the carrier procures the further stipulation in such bill of lading that the freight shall be payable to him, it is held that he ought personally or by agent to be present to receive payment from the consignee at the proper time and place.³ In general, the tardy and negligent performance of a duty respecting payment which the carrier owes may, in case of the consignee's subsequent insolvency, be reasonably visited upon himself instead of his consignor, because of the two innocent parties he has occasioned the loss.

Where the consignee receives his goods under a bill of lading, this is evidence from which a contract may be inferred to pay freight in consideration of the carrier's surrender of his lien thereon;⁴ and some cases seem to presume the con-

¹ *Wooster v. Tarr*, 8 Allen, 271.

² *Ib.*; *Fox v. Nott*, 6 H. & N. 630; *Shepard v. De Bernales*, 13 East, 565; *Holt v. Westcott*, 43 Me. 445; *Angell Carriers*, § 397; *Woodward, J.*, in *Thomas v. Snyder*, 39 Penn. St. 317, 322. See *Weguelin v. Collier*, L. R. 6 H. L. 286, where certain language contained in the bill of lading was held equivalent to the usual clause, "he or they paying freight."

³ *Thomas v. Snyder*, 39 Penn. St. 317.

⁴ *Cock v. Taylor*, 13 East, 399; *Dougal v. Kemble*, 3 Bing. 383; *Sanders v. Vanzeller*, 4 Q. B. 260; *Parke, B.*, in *Young v. Moeller*, 5 E. & B. 755, 760.

tract to pay very strongly under such circumstances.¹ But if the consignee designated in the bill of lading indorses the bill over before receiving the goods, his liability becomes thereby transferred, together with the right to claim them;² and whoever obtains the delivery of goods under such a bill contracts, by implication, to pay the freight due on them.³ The English Bills of Lading Act strengthens this doctrine as enforced in that country, by providing in substance that the rights and liabilities of the consignee or indorsee shall pass from him by indorsement over to a third person.⁴ A refusal by the consignee to accept, unless upon deduction for damage done the goods, does not constitute acceptance of the consignment, and a contract to pay freight.⁵

§ 537. **The same Subject.** — Where goods are consigned by the terms of the bill of lading, so that delivery is made to one party as the agent for another, the receiving party incurs no personal liability for the freight; but his principal will rather become bound as the true consignee.⁶ And if the carrier delivers to the indorsee of a bill of lading he cannot

¹ See *Dougal v. Kemble*, *supra*; *Meriam v. Funck*, 4 Denio, 110; *AngeH Carriers*, § 397, 5th ed., and the valuable notes of Mr. Lathrop; *New York Nav. Co. v. Young*, 3 E. D. Smith, 187. See *Hinsdell v. Weed*, 5 Denio, 172, as to the effect of receiving the goods in part, after a partial loss.

² *Cock v. Taylor*, 13 East, 399; *Dougal v. Kemble*, 3 Bing. 383; *Tobin v. Crawford*, 5 M. & W. 235; 9 M. & W. 716.

³ *Ib.*; *Meriam v. Funck*, 4 Denio, 110. *Dougal v. Kemble*, 3 Bing. 383, is a case in point where this rule was rigorously enforced. And the assignee who, as such, receives the goods, may be held liable for freight, even though the bill of lading was made after the goods were sent to a public warehouse. *New York Steam Nav. Co. v. Young*, 3 E. D. Smith, 187.

⁴ Act 18 & 19 Vict. c. 111; *Smurthwaite v. Wilkins*, 11 C. B. N. S. 842. But, as concerning the carrier's knowledge and assent to such transfer, see *Lewis v. M'Kee*, L. R. 2 Ex. 37; L. R. 4 Ex. 58.

⁵ *Davis v. Pattison*, 24 N. Y. 317.

⁶ *Amos v. Temperley*, 8 M. & W. 798; *Grove v. Brien*, 8 How. 429; *Miner v. Norwich R.*, 32 Conn. 91; *Allen v. Bareda*, 7 Bosw. 204.

recover freight from the purchaser after delivery from the indorsee.¹

One to whom a bill of lading is assigned merely as security is not liable for the freight if he does not receive the goods.²

§ 538. **Reimbursement of Carrier's Expenses; Extortionate Charges not allowed.**—A carrier may be entitled to the reimbursement of incidental charges and expenses reasonably incurred in the performance of the transit, which his special contract does not restrain him from demanding; but he cannot charge for services which were not performed, nor for expenses not reasonably incurred, nor, in general, overcharge, or demand exorbitant and unlawful recompense. Sums thus extorted from a consignee or customer, and paid under protest, the aggrieved party may recover from the carrier as for money had and received.³

Nor ought a carrier in general, without some sort of authority from the consignee, to perform acts upon the goods outside of his transportation contract, such as may subject the consignee to extra expense, even though this might prove in a measure beneficial; as where a carrier undertakes at his own discretion to make good the ordinary wear and tear of the transit at his consignee's cost, or makes personal delivery, at a special charge, in teams of his own employing, when his legal duty was to let the consignee come and remove them from his depot in whatever mode he might choose for himself.⁴

¹ 28 Fed. R. 335.

² *Blanchard v. Page*, 8 Gray, 281; *Swett v. Black*, 2 Spr. 49. And see, as to a surety, *Trask v. Duvall*, 4 Wash. 181. See also 7 Biss. 365.

³ *Garton v. Bristol & Exeter R.*, 1 B. & S. 112; 15 Neb. 390; *Great Western R. v. Sutton*, L. R. 4 H. L. 226; *Heiserman v. Burlington R.*, 63 Iowa, 732. In *Peters v. Scioto R.*, 42 Ohio St. 275, the customer's right to recover illegal exactions as not paid voluntarily is ruled quite strongly. Here payments were made periodically, instead of upon each shipment.

⁴ *Richardson v. Rich*, 104 Mass. 156. See *Cahn v. Michigan Central R.*, 71 Ill. 96.

§ 539. **Charges where Sender imposed upon the Carrier.**—On the other hand, where the sender has fraudulently or even carelessly induced a transportation at reduced rates, the carrier may, upon discovering the fraud or error, require payment of his regular and proper charges for carrying the goods.¹ But where no deceit or imposition of any kind was practised by the sender, and no inquiry was made as to the contents or value of the package, the carrier cannot charge more than his agreed recompense, on any plea that it proved more hazardous or more valuable than he had supposed.²

§ 540. **Right to charge Demurrage.**—Demurrage is an allowance which marine law makes by way of indemnity to the carrier where the vessel has been detained unreasonably long in loading or unloading the cargo through the fault of the customer.³ If this right exists at all, so as to afford a lien, independently of contract, statute, or usage tantamount to law, it is confined to carriage by water; and while railroad carriers may store in case of delay and charge storage rates, or perhaps sue for special damages, they cannot claim demurrage, nor enforce such a claim by a lien upon the goods.⁴

§ 541. **Legislative Tariff of Charges.**—It is constitutional for a State legislature which has not abdicated fundamental powers to fix the maximum compensation which railway and other carriers shall charge the public.⁵ But a State cannot,

¹ *Fry v. Louisville R. (Ind.)*, 2 N. E. 744; *Smith v. Findley*, 34 Kan. 316.

² *Baldwin v. Liverpool Steamship Co.*, 74 N. Y. 125 (where nitro-glycerine was thus carried).

A carrier who agrees with the sender to carry goods at less than the regular rates is bound thereby. 16 Neb. 661.

³ 3 Kent Com. 159; Bouv. Dict. "Demurrage;" Myer Fed. Decisions, Carriers, §§ 753-758.

⁴ *Chicago R. v. Jenkins*, 103 Ill. 588; 15 Neb. 390; *East Tennessee R. v. Hunt*, 15 Lea, 261.

⁵ See *Peik v. Chicago R.*, 94 U. S. 164; *Chicago R. v. Ackley*, 94 U. S. 179.

Modern legislation is frequently directed against the tendency of rail-

under our Federal constitution, regulate rates of transportation to and from another State.¹

§ 542. **Carrier's Recompense secured by Lien.** — The compensation of the common carrier whose pay has not been taken in advance, continues, at his option, recoverable upon the lien security of the goods and chattels themselves; which is so common a means of assistance in obtaining one's dues under his bailment performance, and so highly advantageous, that the law presumes, wherever a carriage undertaking is performed as to certain property without previous reward, that the carrier meant to retain its possession at the end of the transit until fully remunerated; and this, whether the transportation were by land or water.² In its character and extent this lien is quite similar to that of innkeepers and ordinary mutual-benefit bailees which we have elsewhere discussed.³ Thus, there may arise in favor of the carrier, by virtue of a wide-spread custom or usage, or under some special contract, a general lien upon his customer's goods, for a general balance of accounts;⁴ but that which alone the law can be said to favor is a particular lien upon the goods transported, for the particular charges and expense incurred in respect of them.⁵

§ 543. **What Charges a Carrier's Lien protects.** — A common carrier, then, may usually retain particular goods, by virtue

ways and other common carriers to make excessive and wrongful charges, and penalties are prescribed for the offence. *Supra*, §§ 374-376, 485. See, *ib.*, concerning the extent of the carrier's duty not to transport at unequal or at excessive rates.

¹ *Wabash R. v. Illinois*, 118 U. S. 557.

² *Story Bailm.* § 588; *Skinner v. Upshaw*, 2 Ld. Raym. 752; *Angell Carriers*, §§ 356, 369; *Langworthy v. New York & Harlem R.*, 2 E. D. Smith, 195; 1 *Schoul. Pers. Prop.* §§ 378-380; 2 *Kent Com.* 634; *The Eddy*, 5 Wall. 481; *Long v. Mobile R.*, 51 Ala. 512; cases *infra*.

³ *Supra*, §§ 122, 123.

⁴ *Angell Carriers*, §§ 358-362; *Rushforth v. Hadfield*, 6 East, 519; 7 East, 224; *Wright v. Snell*, 5 B. & Ald. 350.

⁵ *Adams v. Clark*, 9 Cush. 215; cases *infra*.

of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien, moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines; since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property as security for his reimbursement.¹ If a consignor exercises the right of stoppage *in transitu* he must honor the carrier's particular lien for his recompense.² But the carrier's lien does not protect overcharges;³ nor charges unenforceable of legal right;⁴ nor a repayment from the consignee of what has been paid in advance.⁵ It does not as a rule secure former freight remaining unpaid, or the customer's general indebtedness;⁶ nor acts performed towards the property which were entirely outside of what was expressed or implied in the carriage contract.⁷

Yet the carrier's lien is sometimes specially extended so as to cover the extraordinary expenses which may have been incurred on the transit, with respect to the property, without authority from the owner; as where a vessel goes ashore, and

¹ *Stevens v. Boston & Worcester R.*, 8 Gray, 262; *Briggs v. Boston & Lowell R.*, 6 Allen, 246; *White v. Vann*, 6 Humph. 70; *Schneider v. Evans*, 25 Wis. 241; *Nordemeyer v. Loescher*, 1 Hilt. 499. And see *post*, c. 9, as to connecting carriers.

² *Potts v. N. Y. R.*, 131 Mass. 455.

³ *Long v. Mobile R.*, 51 Ala. 512.

⁴ For carrying mailable matter contrary to the provisions of Congress, the carrier has neither right of action nor lien. *Hill v. Mitchell*, 25 Ga. 704. As to a carrier's lien on goods which he transports on behalf of his government, see *Dufolt v. Gorman*, 1 Minn. 301; *Briggs v. Light-Boats*, 11 Allen, 157; *The Davis*, 10 Wall. 15.

⁵ *Travis v. Thompson*, 37 Barb. 236; *Marsh v. Union Pacific R.*, 3 McCr. 250.

⁶ *Adams v. Clark*, 9 Cush. 215; *Leonard v. Winslow*, 1 Grant Cas. 139; *Pharr v. Collins*, 35 La. Ann. 939.

⁷ *Richardson v. Rich*, 104 Mass. 156; *Steamboat Virginia v. Kraft*, 25 Mo. 76; *Wiltshire Iron Co. v. Great Western R.*, L. R. 6 Q. B. 776.

the cargo is rescued, with a cost, on the carrier's part, not, under the circumstances, unreasonable; for this is done by the bailee in possession for the benefit of all concerned, and the lien claim appears analogous to that for general average or salvage.¹

§ 544. **No Lien against Owner where Bailment was Wrongful.** — The carrier, as against the true owner, has no lien on goods delivered him for transportation by a wrong-doer without such owner's express or implied assent; and this, though he carry them or pay back charges upon them innocently; inasmuch as no one is to be deprived of his property without his consent.² Nor can one who has carried a thing for the sole convenience of the mere hirer thereof, and at his request, acquire a lien upon the property available against the owner.³ And while it must be generally admitted that the carrier's lien, and his right to retain possession, prevail as against the general owner until his reasonable charges are paid him, the courts, nevertheless, rule that this lien and right of possession are so far personal to him that a wrong-doer who has acquired possession cannot set up any such defence to the suit of the general owner.⁴ But where the owner or his agent was at

¹ *Hingston v. Wendt*, 1 Q. B. D. 367. And see *supra*, §§ 122, 123.

² *Waugh v. Denham*, 16 Irish C. L. 405; *Fitch v. Newberry*, 1 Doug. (Mich.) 1; *Robinson v. Baker*, 5 Cush. 137; *Stevens v. Boston & Worcester R.*, 8 Gray, 262; *Clark v. Lowell, &c. R.*, 9 Gray, 231. See *King v. Richards*, 6 Whart. 418.

³ *Gilson v. Gwinn*, 107 Mass. 126. This would seem to indicate that the carrier, in respect of his lien, is less favored as against a true owner than the innkeeper; though whether the doctrine of this case would apply so as to utterly exclude the carrier's lien upon property belonging to another, which the passenger has transported as part of his own baggage, *quære*. A strong reason for preferring the innkeeper in issues like this might be, that the custody and shelter of any owner's property in an inn can hardly fail to be beneficial to him, while transporting it to a distance without his authority is more likely an aggravation of the injury occasioned by the dispossession itself. See *supra*, § 326; and see 72 Ga. 655.

⁴ *Ames v. Palmer*, 42 Me. 197.

fault in procuring transportation to some point, or over some route not intended, the carrier's lien is good for his own charges and those advanced by him, provided they be reasonable and incurred in good faith.¹

§ 545. **Lien how preserved ; Possession Necessary.** — But, in order to preserve his lien security, the general doctrine of liens requires the carrier who claims its benefit to retain possession of the goods, and not deliver them up while his dues remain unsatisfied. An unqualified and voluntary delivery to the consignee entitled will, as a rule, discharge the lien, if the carrier was not defrauded into making it ;² but so highly favored is the bailee's right of lien as to particular goods upon which he has performed an unremunerated and beneficial service, and so concomitant must be the acts of making delivery at the end of a transit and receiving compensation for the carriage, that acts of incomplete or conditional delivery are not, by the leading authorities, deemed decisive of an intention to waive one's convenient right of lien upon the property. Thus, the transfer of goods from a vessel to the warehouse should be considered, if the terms of the contract or local usage can justify the construction, not an absolute delivery, but rather a deposit for the time being in the warehouse, so as to preserve the carrier's constructive possession.³ The discharge of a cargo on a wharf with notice preserves the lien.⁴ Again, should the consignee procure a delivery of the goods to himself by a false and fraudulent promise to pay the freight due as soon as they are received, or otherwise gain their possession by dishonest stratagem or theft, or by coercion of the carrier, the carrier's lien

¹ *Briggs v. Boston & Lowell R.*, 6 Allen, 246.

² *Angell Carriers*, § 370; *Bigelow v. Heaton*, 4 Den. 496; *Story Bailm.* § 588; *Kinloch v. Craig*, 3 T. R. 119; *Sears v. Wills*, 4 Allen, 212; *Bowman v. Hilton*, 11 Ohio, 303; *Bags of Linseed*, 1 Black, 108; 51 Iowa, 338.

³ *Bags of Linseed*, 1 Black, 108; *Mors Le Blanch v. Wilson*, L. R. 8 C. P. 227; *The Bird of Paradise*, 5 Wall. 545, 555.

⁴ *The Eddy*, 5 Wall. 481.

is not waived, but he may disaffirm and sue the consignee in replevin.¹ And, as in other cases of lien, the carrier might make a special delivery, as for enabling the consignee to inspect the condition of the property, or to put it in repair, without impairing his right to hold it for security of the transportation charges.² Where, however, his lien has once been utterly waived and extinguished, the carrier cannot, by merely regaining possession of the goods, enable himself to reassert it.³

§ 546. **Lien not lost by a Partial Delivery.** — The inclination of the courts is certainly against presuming a waiver or extinguishment of the carrier's lien, so long as no more than a partial delivery has been made. Thus, where several cargoes or instalments of coal are successively transported for one owner, and portions thereof carried away and delivered from time to time from the carrier's premises at the place of destination, the presumption would be that the carrier retains his lien upon that which remains for the freight and storage of all the cargoes or instalments.⁴ A corresponding presumption may apply to partial deliveries made for a customer on a round trip.⁵ For the rule is, that for conveying goods the carrier may detain the whole or a part of the goods until the freight on all is paid.⁶ Whether the mutual intent of the parties was to discharge the lien, under such circumstances, contrary to the presumption, a jury must determine.⁷

§ 547. **Total Delivery on Stipulation that Lien shall continue.** — Following out the principle which applies as between

¹ *Bigelow v. Heaton*, 6 Hill, 43; *Angell Carriers*, § 374.

² See *supra*, §§ 122, 123; 1 Schoul. Pers. Prop. § 385.

³ *Ib.*

⁴ *Lane v. Old Colony R.*, 14 Gray, 143. And see *Vitrified Pipes, in re*, 14 Blatchf. 274.

⁵ *Fuller v. Bradley*, 25 Penn. St. 120.

⁶ *Boggs v. Martin*, 13 B. Mon. 239; *Abbott Shipping*, 377; *Angell Carriers*, § 373.

⁷ *New Haven Co. v. Campbell*, 128 Mass. 104.

vendor and vendee, we might, perhaps, conclude that the carrier has the right to deliver the goods fully upon an express or implied condition that his lien shall not be divested until his charges are fully paid;¹ though it blunts the edge of the law to infer qualifications of this character in favor of parties who have totally surrendered actual possession without clearly expressing what rights they mean to reserve; and superior equities may arise in favor of third parties where the carrier has so surrendered.

§ 548. **Extension or Waiver of Lien by Special Agreement.** — So, too, may the parties to the carriage undertaking frame their contract so as to affirm the existence of the lien, or to extend or modify it, or even to exclude it altogether; and on this point the language of a bill of lading, way-bill, or other like document, or the charter-party of a vessel, may be found conclusive.² And while the presumption must be in favor of the carrier's lien, and his intention, if need be, to exercise such a right, this presumption may be overcome by a direct exclusion of the right in the contract of carriage, or by the insertion of some stipulation which is wholly incompatible with its existence. To stipulate that credit shall be given for the consignee's dues would be inconsistent with such a right; or that the goods shall be unconditionally delivered before the freight is paid.³ But where language somewhat ambiguous is employed, justice requires that the carrier should receive the benefit of the doubt; and hence language importing that the payment or adjustment of the carriage dues shall be concurrent or simultaneous with the delivery of the goods, or, at all events, leaving the duty of making a delivery antecedent to such payment or adjustment in doubt, is not to be construed

¹ Hoar, J., in *Lane v. Old Colony R.*, 14 Gray, 143, 148; *The Eddy*, 5 Wall. 481.

² See *Angell Carriers*, §§ 385, 386; *Chase v. Westmore*, 5 M. & S. 180; *Pinney v. Wells*, 10 Conn. 101; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; *Kirchner v. Venns*, 12 Moore P. C. 361.

³ *The Bird of Paradise*, 5 Wall. 515, 556.

into a stipulation for displacing the carrier's lien.¹ Even a stipulation which amounts to giving the consignor or customer a slight credit may be controlled where the general language used imports an intention to claim the usual right of lien; though credit might be promised for so long a period as to justify the inference that the lien was not to attach, but that the personal responsibility of the customer was trusted.²

Questions of this character, however, arise more particularly with reference to sea than land carriage; and in Westminster Hall and the Supreme Court of the United States, where the mutual binding of the ship and cargo for carriage dues under a charter of affreightment has proved an exceedingly interesting question, the manifest inclination has been in favor of the doctrine that while lien for freight, which is a common-law right, may be mutually displaced or waived by special stipulations of carriage inconsistent with and destructive of it, this displacement or waiver is not shown, but the right remains, unless the special agreement is absolutely inconsistent with the retention of the goods for lien security.³

§ 549. **Lien for Unpaid Instalments of Freight.** — There may be, by virtue of the arrangement made for paying or adjusting the freight to the carrier, a right of lien for instalments of

¹ See *The Volunteer*, 1 Sumn. 571; *Logs of Mahogany*, 2 Sumn. 600; *Alsager v. Dock Co.*, 14 M. & W. 798; *Tamvaco v. Simpson*, L. R. 1 C. P. 371; *Paynter v. James*, L. R. 2 C. P. 348.

² *The Kimball*, 3 Wall. 42.

³ See *The Bird of Paradise*, 5 Wall. 545, 558, in which a lucid and very valuable opinion is pronounced by Mr. Justice Clifford; *Foster v. Colby*, 3 H. & N. 715; *Philips v. Rodie*, 15 East, 554; *Kirchner v. Venus*, 12 Moore P. C. 361, and cases cited; *Howard v. Macondray*, 7 Gray, 516; *Pinney v. Wells*, 10 Conn. 104. But it is often a matter of nice construction to determine whether the terms of commercial contracts exclude the lien right or not. In England, where such cases more commonly arise, *Kirchner v. Venus*, 12 Moore P. C. 361, militates against *Gilkison v. Middleton*, 2 C. B. n. s. 134, and *Neish v. Graham*, 8 E. & B. 505. See also, as to the sea-carrier's claim of lien for "dead freight," *Kerford v. Mondel*, 5 H. & N. 931; *Fry v. Chartered Bank of India*, L. R. 1 C. P. 639; *Gray v. Carr*, L. R. 6 Q. B. 522.

freight still due and unpaid. Problems of this character are very intricate for solution; but the better opinion appears to be that when an acceptance for freight or an instalment thereof is overdue and unpaid, this, even though it were given for an instalment payable in advance, leaves the carrier free to stand upon his lien right, unless he has clearly waived it; since a bill of exchange or promissory note does not extinguish or operate as payment of a debt unless the parties have so expressly agreed.¹ But sums stipulated to be paid in advance, and not dependent on the carrier's contract, have not the incidents of freight, and are not, unless by virtue of usage or special contract, protected by the carrier's lien.² Notwithstanding one instalment of the stipulated freight has been paid on arrival, and the balance is made expressly payable on delivery of the goods, the presumption of intention favored would be that delivery and payment are concurrent acts, so as to leave the carrier's lien right unimpaired.³

§ 550. **Legal Effect of Carrier's Lien; Right to sell.** — The legal effect of the carrier's lien is, that he may retain the goods and suspend delivery thereof until his compensation and rightful charges for their transportation are properly adjusted; and if the lien be upon merchandise carried on the high seas, the carrier may enforce it by proceedings *in rem*.⁴ But no carrier has a right by virtue of a lien — which, in common law, is practically only a right of detainer — to sell the goods as of his own motion, and so reimburse himself; nor would he, by such sale, confer title upon another more than a wrong-doer could.⁵ This hardship has, in some meas-

¹ Steamer *St. Lawrence*, 1 Black, 533; *The Kimball*, 3 Wall. 37, 45.

² See Mr. Justice Clifford, in *The Bird of Paradise*, 5 Wall. 545, 562; *How v. Kirchner*, 11 Moore P. C. 21.

³ *Paynter v. James*, L. R. 2 C. P. 348.

⁴ See Mr. Justice Clifford, in *The Bird of Paradise*, 5 Wall. 545, 555.

⁵ *Lecky v. M'Dermott*, 8 S. & R. 500; *Briggs v. Boston & Lowell R.*, 6 Allen, 246; *Hunt v. Haskell*, 21 Me. 339; *Sullivan v. Park*, 33 Me. 438; *Indianapolis R. v. Herndon*, 81 Ill. 143.

ure, been rectified by local legislation, which provides, to some extent, that unclaimed property in the hands of certain carriers, such as railways or express companies, or, more generally, that freight transported by steam or sailing vessels, or other specified carriers, may be sold to pay the carriage charges; and, moreover, directs how the sale shall be conducted and the proceeds applied.¹ And since the carrier, with property left on his hands, in an emergency, is a sort of trustee for the rightful owner or party in interest, he may, on such a consideration, but not by right of the lien, make a fair and open sale of the property where the goods are perishable, or other extreme occasion occurs for prompt and decisive action on his own responsibility, and, deducting his freight and charges out of the proceeds, retain the balance for disposition according to law;² though, so perilous must be such a course on his part, it is very doubtful whether the carrier is under any obligation, after fulfilling his contract of transportation, to make such sale at all.³ Under all circumstances the carrier's sale should be openly and fairly conducted, with a just regard to the owner's interests.⁴

§ 551. **Carrier may sue for his Compensation.** — Independently of the lien security, a carrier may, after relinquishing his possession of the property transported, bring his action at law to recover his rightful compensation; unless, indeed, he

¹ See, *e. g.*, Mass. Pub. Stats. (1882) c. 96.

² *Rankin v. Memphis Packet Co.*, 9 Heisk. 564; *Arthur v. Schooner Cassius*, 2 Story, 81, 97. By virtue of his special undertaking, the carrier is sometimes empowered to make sale of the goods at the place of destination, — in other words, he is both carrier and factor for his customer; but this is quite a different case. See *Angell Carriers*, § 355; *Rapp v. Palmer*, 3 Watts, 178; *supra*, § 368. *Quare*, whether a special contract of the parties may give the carrier a power to sell. *Sayward v. Stevens*, 3 Gray, 97, 105. The provision of a bill of lading to this effect, even if assented to by the consignor, does not necessarily conclude the consignee and all other possible parties in interest.

³ As to lien upon baggage, see Part VII. c. 4.

⁴ See *Nathan v. Shivers*, 71 Ala. 117.

has stood upon his legal right of claiming pay in advance. The principles here applicable have already been incidentally set forth.¹

§ 552. **Payment and Delivery are Concomitant Acts.** — Payment of the transportation dues and delivery of the goods are concomitant or concurrent acts; so that neither consignor nor carrier is obliged to perform on his part until the other is ready to perform the correlative duty.² And under the ordinary bill of lading, given for carriage by water, freight is demandable only when the goods are discharged from the vessel, and the party to whom delivery is owed has reasonable opportunity to examine into their condition; while, on the other hand, the carrier is under no obligation to part with possession of the goods, or make actual delivery, except upon payment or tender of his lawful dues.³

When, therefore, the party to whom the goods were to be delivered offers to pay the freight and charges rightfully due, the carrier's refusal to deliver them is a breach of his contract duty, for which an action of assumpsit will lie; and all that the consignee need aver and prove, in support of such action, is his readiness to pay the freight, the demand of the goods, and the carrier's refusal to make delivery.⁴ Indeed, where the carrier's non-delivery is clearly wrongful, as, for instance, where he refuses to give the property up, except on payment of that which the lien does not protect, or the fulfilment of a condition which he has no right to impose, trover may be

¹ *Supra*, §§ 531-536; 3 Kent Com. 219; Angell Carriers, §§ 391, 409-417, and cases cited.

² *Tate v. Meek*, 8 Taunt. 280; *Adams v. Clark*, 9 Cush. 215; Angell Carriers, §§ 381, 400; *Long v. Mobile R.*, 51 Ala. 512; *Clark v. Masters*, 1 Bosw. 177, 185.

³ See Johnson, J., in *Vitrified Pipes, in re*, 11 Blatchf. 274; *Black v. Rose*, 2 Moore, N. S. 277; *Lanata v. Ship Henry Grinnell*, 13 La. Ann. 24.

⁴ 2 Saund. 352 n. 3; *Porter v. Rose*, 12 Johns. 209; *Long v. Mobile R.*, 51 Ala. 512, 513; Metcalf, J., in *Adams v. Clark*, 9 Cush. 215.

brought against him instead, with a suitable averment on the plaintiff's part.¹ Replevin of the goods also lies, as modern authorities hold, for the carrier's wrongful refusal to give them up, and this to the forfeiture, it may be, both of his lien and compensation for freight;² and where the carrier has, by his delay in transporting and making delivery of the goods, injured the consignee to an amount equal to the freight charges, it is held that the consignee may maintain replevin for the goods, without paying or tendering the freight.³ But, in general, to enable the consignee to sue the carrier for withholding delivery of the goods, he must tender the freight;⁴ nor should the carrier's request for reasonable time to ascertain and verify, especially on a long, continuous line, what freight may be lawfully due, be necessarily construed into an absolute refusal on his part to perform his duty.

§ 553. **The same Subject; Mutual Rights of Carrier and Consignee.** — Hence, too, it follows that, since no consignee is bound to pay freight until the goods are delivered, or offered for delivery, independently of an express contract to do so, the carrier cannot sue such a party for his freight until he has at least tendered the goods. And where a carrier by vessel stood upon his legal right not to deliver the cargo, or any part of it, until his freight was paid, and the consignee of the cargo stood upon his right not to pay freight until the cargo was discharged, ready to be completely delivered, it was held, in a recent case, that the carrier, by subsequently landing the cargo, did not enable himself to sue for his freight

¹ *Ib.*; *Marsh v. Union Pacific R.*, 3 McCr. 236; *Richardson v. Rich*, 104 Mass. 156.

² *Cutting v. Grand Trunk R.*, 13 Allen, 381; *Humphreys v. Reed*, 6 Whart. 435; *Boston R. v. Brown*, 15 Gray, 223; *Dyer v. Grand Trunk R.*, 42 Vt. 441. And see next chapter.

³ *Dyer v. Grand Trunk R.*, 42 Vt. 441. And see *Hall v. Cheney*, 36 N. H. 26; *Alden v. Pearson*, 3 Gray, 342.

⁴ *Clark v. Masters*, 1 Bosw. 177, 185.

before he had given the consignee notice of such delivery, or made demand for his recompense.¹

§ 554. **Goods shipped as Entire not to be treated as in Portions.**—Neither carrier nor consignee can require, as of right, that goods under one bill of lading shall be delivered in parcels on a separate payment of freight for each parcel.² Nor where a shipment is landed in parts, can freight upon the whole shipment be demanded upon a part delivery.³

¹ *Vitrified Pipes, in re*, 14 Blatchf. 274. In this case the goods were libelled for the freight, and the court dismissed the libel with costs. The assignee of a bill of lading may have the cargo weighed and examined to verify quantity and quality. But he cannot require a delivery without paying freight, nor insist upon unreasonable methods of weighing. *The Schooner Treasurer*, 1 Spr. 473. Vexatious conduct in this respect may be construed into a refusal to accept delivery. *Ib.* And a tender of the cargo to the consignee, though not formal, may be sufficient where the consignee refuses unjustifiably to receive it, and a reasonable time is given him to accept. 1 Fed. R. 619. See, further, *McCullough v. Hellwig* (Md.), 7 Atl 455.

² *Vitrified Pipes, in re*, 14 Blatchf. 274. And see *Paynter v. James*, L. R. 2 C. P. 348.

³ *Brittan v. Barnaby*, 21 How. 527.

CHAPTER VIII.

REMEDIES AGAINST COMMON CARRIERS.

§ 555. **Causes of Action against Common Carrier stated.**— Three leading causes of action are recognized in favor of the customer as against the common carrier: I. For inexcusably refusing to receive goods offered him for transportation. II. For transporting them, or accomplishing the bailment purpose, so that they become inexcusably lost or injured. III. For his negligence or misconduct in delivering them over, after his transit is completed.

§ 556. **Remedy for Refusal to receive.**— I. Where the common carrier inexcusably refuses to receive goods offered him for transportation. The obligation of the carrier, in this respect, with its true limitations, has already been sufficiently considered.¹ The usual form of common-law action against the carrier, for such refusal, is case; and the plaintiff should aver that he was ready and willing to pay the defendant the amount such party was legally entitled to receive for receiving and carrying the goods in question; an absolute tender of recompense not being, under these circumstances, an indispensable prerequisite to maintaining one's suit.² The consignor or owner whose property is inexcusably refused transporta-

¹ *Supra*, §§ 373-383.

² *Supra*, §§ 373-383; *Pickford v. Grand Junction R.*, 8 M. & W. 372; *Crouch v. Great Northern R.*, 11 Ex. 742, 758; *Angell Carriers*, §§ 124, 418; *Galena R. v. Rae*, 18 Ill. 488; *M'Gill v. Rowand*, 3 Penn. St. 451; *Fitch v. Newberry*, 1 Dougl. (Mich.) 1; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Pittsburgh R. v. Morton*, 61 Ind. 539. And see *supra*, § 374, as to the right to sue the carrier for discriminating unjustly in favor of certain customers.

tion is the proper party to sue the carrier on such a grievance, rather than any mere consignee.¹

How far mandamus will lie to compel a carrier to perform his public obligation is not clearly decided; this being, however, a remedy which should not, in general, be invoked where the injured party has another, specific and adequate, under the common law.²

§ 557. **Remedy for Loss or Injury in Transportation.**—II. Where transportation or the accomplishment of the bailment purpose is such that the goods become inexcusably lost or injured. In this instance of surpassing importance it is a matter of regret that our law should not, in all points, make the bailment remedies clear and certain, more than the bailment rights. These remedies we shall, however, proceed to state with as much precision as the nature of the case admits.

§ 558. **Form of Action in such Cases.**—1. Concerning the form of action. This, at common law, may be *ex delicto* or *ex contractu*. So long as the common-carriage occupation was considered simply as a public duty, its breach was deemed tortious, and the carrier suable in an action on the case founded upon the custom of the realm; but when contract began to assuage the rigor of public policy, it became established that the carrier should be held liable in assumpsit on his undertaking; and hence the modern usage to lay hold of the advantages of the action *ex contractu*, while preserving those likewise of that more ancient remedy against carriers,

¹ *Lafaye v. Harris*, 13 La. Ann. 553; *supra*, § 383. Where one sues for the carrier's refusal to transport goods tendered him, the measure of damages is the difference between the value of the property at the place of tender and its value at the desired destination, less expenses of transporting. *People v. New York R.*, 22 Hun, 533; *Harrison v. Stewart*, Taney, 485; *Galena R. v. Rae*, 18 Ill. 488. See also, as to damages, *Houston R. v. Smith*, 63 Tex. 322.

² See *supra*, § 383. Injunction to prevent discrimination is sometimes permitted. 27 Fed. R. 529.

ex delicto, which the practice of earlier centuries commended.¹ Where the transaction and the character of the loss require the plaintiff to show a contract, express or implied, with the carrier, to support his action, contract is the true remedy; otherwise, the preferable form of action is tort.

§ 559. **The same Subject; Action *ex Delicto*.**—The action *ex delicto*, which may be safely brought as an action on the case where one seeks to charge the carrier on a simple breach of duty depending on the common law and public policy, or on some other tort or misfeasance, has this advantage, that, if it

¹ Angell Carriers, § 422, and cases cited; *Dale v. Hall*, 1 Wils. 282 (1750), per Dennison, J.; *Tattan v. Great Western R.*, 2 E. & E. 844; *Baylis v. Lintott*, L. R. 8 C. P. 345; *Orange Bank v. Brown*, 3 Wend. 158; *Smith v. Seward*, 3 Penn. St. 342; *School District v. Boston*, &c. R., 102 Mass. 552; *Baltimore R. v. Pumphrey*, 59 Md. 390.

The above cases concede to the aggrieved party quite a free choice of remedies against a defaulting carrier, as between the action *ex delicto* and the action *ex contractu*, unless it is incumbent upon him to show some special contract, express or implied; and this, though there be in reality a privity of contract between the parties.

But in England (where the choice of action in this respect may affect the question of costs as limited and prescribed by statute) the disposition appears manifested to narrow the plaintiff's election if possible. And in *Baylis v. Lintott*, L. R. 8 C. P. 345, it is held that, in an action against a hackney-coach proprietor for not securely carrying the baggage of one who had hired the carriage, where the declaration alleged that "in consideration" that the plaintiff would, with her baggage, become a passenger and "of certain reward," etc., the defendant "promised" to carry the plaintiff and her baggage safely, and that, not regarding his duty nor "his said promise," he did not safely carry the baggage, but so carelessly and negligently conducted himself that part of said baggage was lost, — this was held to set forth a cause of action founded in contract. In *Tattan v. Great Western R.*, 2 E. & E. 844, however, a form of declaration somewhat similar was considered to amount to case and not contract. But Cockburn, C. J., in that case expressed his regret at the anomalous state of the law, by which an option was given to the plaintiff to sue in either form. In *Baylis v. Lintott*, the remarks of Bovill, C. J., indicate a similar regret, and the opinion, besides, that where the cause of action alleged is not founded wholly on the breach of duty, but the declaration sets forth in substance a promise and consideration, this must be considered to amount to contract and not tort.

be uncertain whether some or all of certain parties are liable, the plaintiff may recover against all who are liable, while the rest go free, since the action itself is several and not joint; whereas one who sues in assumpsit must prove the liability of all against whom he brings his suit.¹ And, further, in respect of non-joinder or misjoinder, where the form of action is *in delicto*, the defendant carrier cannot set up in abatement that he is one of several part-owners of a ship, or co-proprietors in a land carriage, and that the other part-owners or co-proprietors are not joined as parties in the suit.² Still another advantage of this form of action is, that the duty of the carrier in the premises need not be set out in the pleadings, nor proved, with as much particularity as would be requisite were the suit brought on a carrier's contract undertaking. For it is enough that the proof conforms substantially to the statements in the declaration, and that the declaration, without alleging any promise on the carrier's part, states, by way of inducement, that defendant is a common carrier, and that certain goods and chattels were delivered him, to be carried from A to B for a certain reasonable reward; and assigning, as injury, that the defendant carelessly and negligently behaved, so that the goods and chattels were lost.³

§ 560. **The same Subject; Count in Trover.** — The declaration to an action on the case against a carrier may contain a count in trover in addition to the other count; which, too, is sometimes advantageous to the party who brings a suit. And this practice is permissible wherever there may be the same judgment applicable to both counts, notwithstanding the plea be a different one.⁴ Conversion imports, however, a wrong

¹ Angell Carriers, §§ 423, 424; Bretherton v. Wood, 3 Brod. & B. 54; Tattan v. Great Western R., 2 E. & E. 844; Smith v. Seward, 3 Penn. St. 342; Pozzi v. Shipton, 1 P. & D. 4; Lake Shore R. v. Bennett, 89 Ind. 457.

² Ib.; Orange Bank v. Brown, 3 Wend. 158.

³ See 1 Chitt. Pl. 248; Forms in Appendix, *post*.

⁴ Dickon v. Clifton, 2 Wils. 319; Govett v. Radnidge, 3 East, 62, 69;

more transcendent than the mere negligent omission of an act which the carrier owed, or even his careless and negligent performance of duty; for by conversion one fundamentally deals with another's property without right as though it were his own;¹ and our previous discussion of the law of bailments shows that a bailee renders himself liable in trover where he, without permission, undertakes to sell, pledge, give away, or otherwise misappropriate the property which has been confided to his keeping. But, in a more technical sense, and with less reference to the wilful conduct of the bailee, trover against a carrier will be supported by proof that the carrier or his servant misdelivered the goods, though this were by mistake, by a delivery to the wrong person;² or, as one might reasonably add, that he delivered to the right person, in violation of the conditions imposed upon such delivery.³

In order to maintain trover as for conversion against a common carrier, a demand is needful wherever the fact of conversion is not decisive, so that the converting intent and behavior, as thus fixed upon the party, may be established in legal proof; for trover cannot be sustained without some proof of conversion. But formal demand is dispensed with where such demand would be useless, and the fact of conversion is clearly enough shown, independent of such formality; as

Angell Carriers, § 430; *Hawkins v. Hoffman*, 6 Hill, 586; *Dwight v. Brewster*, 1 Pick. 50; *Packard v. Getman*, 6 Cow. 757; *Johnson v. Strader*, 3 Mo. 359; *Bullard v. Young*, 3 Stew. 46.

¹ *Ib.*; Abbott Law Dict. "Conversion;" *Bowlin v. Nye*, 10 Cush. 416.

² *Supra*, § 490; *Devereux v. Barclay*, 2 B. & Ald. 702; *Clafin v. Boston & Lowell R.*, 7 Allen, 341.

³ See *Murray v. Warner*, 55 N. H. 546, 550, where goods were delivered to a carrier, "C. O. D.," for collection on delivery, and he delivered them to the consignee without payment. This was an action of case with a count in trover. And see *supra*, § 507. See also *Pontifex v. Midland R.*, 25 W. R. 215, as to delivery to a consignee after notice of stoppage *in transitu*. And see *Trowell v. Youmans*, 5 Strobb. 67.

where the carrier has already transferred the thing to some party, as he had no authority to do, or where the property has been actually lost or destroyed by him ;¹ or where he refuses to deliver, except upon payment of charges which he has no right to claim, or on some other condition which he cannot lawfully exact.² In certain instances, a clearly tortious refusal may establish conversion against the carrier, even where the demand upon him was irregular.³ And if the carrier has sold the goods and retains the proceeds, whether a demand be needful or not, before an action of assumpsit can be maintained against him for such proceeds, the carrier's own action against such plaintiff, to recover a balance due for freight, is held a sufficient refusal to enable the latter to sue without making a demand.⁴

Demand and refusal do not, of course, conclude a carrier guilty of conversion, but serve only as evidence in an issue otherwise open to explanation ; and, if it prove that the carrier lost or injured the goods by his mere negligence or default, this supports the count of case, but not that of trover.⁵

§ 561. **The same Subject ; Action ex Contractu.** — Where, however, the remedy against the common carrier is *ex contractu*, assumpsit is the regular form of action, this being

¹ Alden v. Pearson, 3 Gray, 342.

² *Supra*, § 552 ; Adams v. Clark, 9 Cush. 215 ; Richardson v. Rich, 104 Mass. 156 ; Long v. Mobile R., 51 Ala. 512.

See *supra*, § 553, as to the requirement of a tender of freight where one sues as for non-delivery of the goods ; payment and delivery being concomitant acts.

³ Marine Bank v. Fiske, 71 N. Y. 353.

⁴ Stevens v. Sayward, 3 Gray, 108.

⁵ Angell Carriers, § 433 ; Dwight v. Brewster, 1 Pick. 50 ; Hawkins v. Hoffman, 6 Hill, 586, 588.

As to a further possible advantage, in respect of gaining costs, under the limitations imposed by practice acts, where one sues for the tort rather than under a contract, see Tattan v. Great Western R., 2 E. & E. 844 ; Baylis v. Lintott, L. R. 8 C. P. 345.

applicable generally to all contracts not under seal whose breach is alleged, whether the promise was express or only implied. It is manifest that, by thus relying upon an undertaking rather than a duty imposed by public authority or custom of the realm, the plaintiff takes a far more extensive range of our modern common-carrier law than he could by suing *ex delicto*, and may well cover those constantly occurring instances where the liability which furnishes a cause of action against the carrier is found qualified and restrained in some manner by the terms of a bill of lading or other special contract, whose provisions cannot be disregarded; while, furthermore, an implied promise to carry will be almost inevitably deducible from the carrier's mere acceptance, sufficient to sustain assumpsit for a loss or injury.¹

As contrasted with the action *ex delicto*, that *ex contractu* has certain advantages of its own. The action survives, unlike that grounded in tort, against the carrier's personal representatives;² a consideration of less consequence, however, where the carrier is a corporation. The plaintiff, too, may join the common money counts, if he has other appropriate causes of action.³ He can maintain assumpsit where trover would have laid instead, as for mis-delivery and misappropriation.⁴ But, as already intimated, by suing in assumpsit, the plaintiff cannot join a count in trover, since contract and tort furnish separate and distinct causes of action;⁵ nor can he join and disjoin parties defendant, at his convenience, but must bring all co-defendants together into his suit, and prove them all liable together.⁶

¹ See 2 Chitt. Pl. 342, 355, 7th ed.; Appendix, *post*, for the form of declaration appropriate to suing a land-carrier in assumpsit.

² 2 Greenl. Evid. § 208; Angell Carriers, § 435.

³ Angell Carriers, § 435.

⁴ *Supra*, § 552; *Sleat v. Fagg*, 5 B. & Ald. 342, 349.

⁵ *Supra*, § 560; Angell Carriers, § 435.

⁶ *Ib.*; *Patton v. Magrath*, 1 Rice, 162.

§ 562. **The same Subject; Forms of Action compared.** — Local practice, however, tends to assimilate forms of action more closely, and overcomes in many respects the technical distinctions of the common law. Thus, in some parts of the United States, the plaintiff, when it is deemed doubtful to which class a particular cause of action belongs, may join a count in contract with a count in tort, averring that both are for one and the same cause of action; though the joinder of actions of contract and tort is not permitted.¹

If the bailment be made under circumstances which do not justify a conclusion that the carrier entered into a contract relation with him for the thing's conveyance, the bailor cannot sue *ex contractu*; but he may, nevertheless, be entitled, in some instances, to bring his action *ex delicto* as for an injury done to his property through the negligence or misconduct of the bailee.² Such is the distinction sometimes raised where articles are transported as a passenger's baggage, for which the bailee might be held responsible under circumstances of loss by default, not as carrier, but in some less onerous capacity.³

§ 563. **Admiralty Proceedings considered.** — Admiralty proceedings, we should add, are sustainable against a defaulting common carrier whose transportation is substantially by sea or those navigable waters over which our admiralty courts take jurisdiction; not, however, to the exclusion of the aggrieved party from the common-law courts.⁴ The chief ground for sustaining a libel of this character appears to be that, in such a case, the contract of affreightment may be viewed as a

¹ Mass. Gen. Stats. (1860), c. 129, § 5; *Alling v. Boston & Albany R.*, 126 Mass. 121.

² *Martin v. Great Indian R.*, L. R. 3 Ex. 9; *Hannibal R. v. Swift*, 12 Wall. 262.

³ See *post*, Part VII. c. 4; *Flint R. v. Weir*, 37 Mich. 111.

⁴ *Citizens' Bank v. Nantucket Steamboat Co.*, 1 Story, 16; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 378; *The Thames*, 14 Wall. 98; *Shepherd v. Harrison*, L. R. 5 H. L. 116.

maritime contract, and the service undertaken by the carrier a maritime service; but, where the issue is made upon one's breach of a legal duty, it might be said, instead, that there was a marine tort, committed on the navigable waters, of which admiralty might properly take cognizance.¹

The peculiar relation of the State and Federal courts, under the Constitution of the United States, whereby admiralty jurisdiction is enforced independently of State authority, may commend this method of procedure as a preferable one in many cases where the carrier by water is in default; not to speak of those more general advantages which a libel *in rem* and an appeal to the familiar rules and methods of procedure recognized by commercial countries might afford the aggrieved party.

§ 564. **Party Plaintiff in Case of Loss or Injury.** — 2. Concerning the party plaintiff, where goods are lost or injured in transportation. Here, again, is to be found a considerable diversity of opinion, notwithstanding the general rule that an action should be brought in the name of the person whose legal right of ownership has been thereby affected;² for the carriage of goods usually imports one owner at the place of bailment delivery, to be succeeded by another at the terminus of the route, the latter being more the immediate party to controversies with the carrier over the loss or injury of that which would in due course have reached his possession unimpaired.

¹ *Ib.*; 2 Parsons Shipp. 559-566; Angell Carriers, §§ 419-421. The holder of a bill of lading for water carriage has a threefold remedy, — against the master on his undertaking, against the owners personally, or against the vessel *in rem*. Olc. 12, 15; 1 Ware, 263. And see *Blum v. The Caddo*, 1 Woods, 64.

² *Dawes v. Peck*, 8 T. R. 330; *Law v. Hatcher*, 4 Blackf. 364; *Sanford v. Housatonic R.*, 11 Cnsh. 155. That, as against the true owner and shipper who sues him, the carrier cannot set up that he transacts his business under a fictitious name, in violation of statute, see *Wood v. Erie R.*, 72 N. Y. 196. See also *Woods, J.*, in *Blum v. The Caddo*, 1 Woods, 64, and cases cited.

The theory of ownership suffers in the modern construction of this right to sue the carrier, however well it may establish that the mere servant or agent, who has contracted solely for another without having any direct beneficial interest in the bailment transaction, is not the proper party plaintiff in the case.¹ Even here, one like a warehouseman, a carrier, or other principal bailee, having a beneficial interest in the subject-matter of the carriage contract, may, by reason of his privity with the carrier who occasions a loss, his beneficial interest, and his own obligation to answer over to the true owner, be the suitable party plaintiff.²

§ 565. **The same Subject; Consignor or Consignee.**—The consignor is generally favored as the party properly entitled in cases of land carriage to sue the carrier; not only for the latter's wrong or breach of contract in connection with accepting the goods for transit, but likewise, though less positively, where loss or injury occurs while the bailment purpose is being accomplished. The most widely accepted reason of this appears to be that, at the time the loss or injury occurs, and the carrier becomes in default, the consignor is still the owner, general or special, of the property bailed.³ But this very admission of general and special ownership leaves open a potential right of action against the carrier, apart from an absolute proprietorship of the thing. And, further, the inclination of various eminent authorities is, in a word, to respect the consignor's right to bring his action, because of his original contract with the carrier, and his liability over to the owner, apart from any personal ownership in the thing.⁴

¹ See Angell Carriers, § 492.

² Shields v. Davis, 6 Taunt. 65; *supra*, § 537; c. 9, *post*.

³ Freeman v. Birch, 1 Nev. & M. 420, where a laundress, who paid for the carriage of her customers' linen, was allowed to sue for a loss by the carrier; Greene v. Clarke, 12 N. Y. 343; W. & A. R. v. Kelly, 1 Head, 158.

⁴ *Ib.*; Davis v. James, 5 Burr. 2680, per Lord Mansfield; Freeman v. Birch, 1 Nev. & M. 420; Atchison v. Chicago R., 80 Mo. 213. Cf. Coombs v. Bristol R., 3 H. & N. 1.

The consignor is pronounced the proper party to bring the action against the carrier, where he plainly continues to be the owner throughout the transit, and was necessarily such at the time when the loss or injury in question must have occurred. Such is the case where an owner transports goods by a carrier, which are to be sold on commission.¹ Or, where the goods are so sent on a conditional sale to the consignee, that a complete transfer of title and property therein must await their arrival and the full accomplishment of the carrier's service.² Or, on a like principle, where they are sent "C. O. D.," and the carrier fails to return either the goods or the money.³ Or where, because of a vendee's fraud or non-compliance with the Statute of Frauds, no transfer of the right of property and risk of loss has actually taken place, but the consignor remains the owner.⁴ Or where a principal sends goods to his mere factor or agent.⁵

§ 566. **The same Subject.**—On the other hand, when delivery of goods to the carrier is on behalf of a consignee in whom is the property therein, with the accompanying risks of ownership, whether such title antedated the consignment, or operates by virtue thereof, the consignee is generally considered the proper party to sue the carrier, in case the goods become lost or injured in transit; and, if the circumstances show that the carriage contract was made by or on behalf of the consignee, so that the carrier undertook as the consignee's bailee, the consignor will not be permitted to sue him at

¹ *Sanford v. Housatonic R.*, 11 Cush. 155.

² *Swain v. Shepherd*, 1 Moo. & R. 224.

³ *United States Express Co. v. Keefer*, 59 Ind. 263. And see *supra*, § 507.

⁴ *Coats v. Chaplin*, 3 Q. B. 483; *Duff v. Budd*, 6 Moore, 469; *Stockdale v. Dunlop*, 6 M. & W. 221; *Angell Carriers*, §§ 495, 496; *Stephenson v. Hart*, 4 Bing. 476; *Coombs v. Bristol & Exeter R.*, 3 H. & N. 510; *Law v. Hatcher*, 4 Blackf. 364; *Carter v. Graves*, 9 Yerg. 446.

⁵ *Wright v. Snell*, 5 B. & Ald. 350; *Price v. Powell*, 3 Comst. 322; *Green v. Clarke*, 2 Kern. 343.

all.¹ The consignee who has bought the goods and paid the freight for their transportation is certainly a proper person to sue, and, as it would appear, the only proper one.² So, too, has the consignor been denied the right to sue, where he sent as a mere agent of the consignee, having no personal responsibility in the employment of the carrier, and exercising no discretion in the choice of the transportation means.³ And as to water carriage it is frequently asserted that the property in the goods shipped is *prima facie* in the consignee, who may sue accordingly.⁴

§ 567. **The same Subject; Test of Contract.** — But, in several instances, the controlling test which appears to have been preferred to that of ownership is that the plaintiff actually contracted with the carrier for transporting the goods in question; though this, perhaps, is a doctrine most frequently relied upon to maintain a consignor's standing in court, where the general property to the goods had confessedly passed out of him before the loss occurred. This privity of contract with the carrier, which is most strongly manifested where the plaintiff actually selected the particular carrier and paid or agreed to pay him for the transportation of the goods, is a strong and reasonable ground of action, and may very conveniently be insisted upon, where no party claiming better rights has intervened to perplex the carrier with other issues of property transfer and legal ownership.⁵

¹ Dawes v. Peck, 8 T. R. 330; Fragano v. Long, 4 B. & C. 219; Brown v. Hodgson, 2 Camp. 36; Angell Carriers, § 497; Everett v. Saltus, 15 Wend. 474; Ilsley v. Stubbs, 9 Mass. 63; Bonner v. Marsh, 10 Sm. & M. 376; 18 Barb. 32; Kirkpatrick v. Kansas City R., 86 Mo. 341.

² South Alabama R. v. Wood, 72 Ala. 451.

³ Thompson v. Fargo, 49 N. Y. 188.

⁴ Lawrence v. Minturn, 17 How. 100; Coleman v. Lambert, 5 M. & W. 502; Blum v. The Caddo, 1 Woods, 64. See also Pennsylvania Co. v. Holderman, 69 Ind. 18. One who has made advances on the consignment may sue as consignee. 3 Blatchf. 289.

⁵ *Supra*, § 565; Mead v. South-Western R., 18 W. R. 735. And see Davis v. James, 5 Burr. 2680; Freeman v. Birch, 1 Nev. & M. 420;

§ 568. **The same Subject; General or Special Ownership.** — Now, as to general or special ownership. Where the bailee of property delivers it to a carrier for transportation, the rule is that either the bailee or the bailor may, in general, sue the carrier for its loss or injury;¹ the court taking heed, as between these parties themselves, that each interest shall be protected out of the judgment, but not permitting the defendant, who is only once answerable, to object. And, as to a bailment for transportation by the agent of an undisclosed principal, the rule is that either the agent or the real principal may sue upon it, saving the defendant's right, in the latter case, of being placed in the same situation at the time of disclosing the real principal, as if the agent had been the contracting party.² Hence, the principal himself, even though undisclosed by his agent, may sue the carrier in his own name to recover damages for loss or injury of the property, sustained while bailment accomplishment was in progress.³ Where one having a special property in the goods bailed them for transportation, the carrier cannot volunteer the defence that some one else was the owner.⁴ And the consignee of property to be sold by him on commission may sue for all damages caused to himself and the owner.⁵

Goodwyn v. Douglas, 1 Cheves, 174; *Blanchard v. Page*, 8 Gray, 281, 289; *Story Bailm.* § 593, 9th ed., Bennett's note; 13 Ill. App. 490.

¹ *White v. Bascom*, 28 Vt. 268; *Freeman v. Birch*, 1 Nev. & M. 420. See also *supra*, § 22.

² *Sims v. Bond*, 5 B. & Ad. 393, per Lord Denman.

³ *Ib.*; *Higgins v. Senior*, 8 M. & W. 831; *Beebe v. Robert*, 12 Wend. 413; *Taintor v. Prendergast*, 3 Hill, 72; *Elkins v. Boston & Maine R.*, 19 N. H. 337; *Sanderson v. Lamberton*, 6 Binn. 129. This rule applies, notwithstanding the Statute of Frauds. *Higgins v. Senior*, *supra*. And see *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, where the same doctrine was approved in the celebrated case of the loss of the steamer *Lexington* in Long Island Sound. Here a bank had delivered to Harnden's express a large amount of specie for transportation, but Harnden had in his own name contracted with the Steam Navigation Company for its due conveyance.

⁴ *Denver R. v. Frame*, 6 Col. 382.

⁵ *Boston & Maine R. v. Mower Co.*, 76 Me. 251.

§ 569. **The same Subject; Miscellaneous Points.** — The joint owners of personal property intrusted to a common carrier have been permitted to sue together for its loss, notwithstanding the receipt which the carrier gave for the property when he received it acknowledged that he had received it from two of them, — the joint ownership of the other plaintiff being unknown to him.¹ And a receipt given by the consignee on arrival of the goods, though purporting to acknowledge their receipt in good order, does not necessarily estop a consignor from suing as of right for the carrier's negligent transportation.²

An action against a common carrier for goods and chattels belonging to a minor child ought to be brought in the name of the child;³ though the fundamental principle here considered is simply that of ownership. By the common law a wife's personal property vests, for the most part, in her husband; and though the married women's legislation and the modern doctrine of separate property has greatly changed this state of things, it remains true that, as to things personal which are not the separate property of the wife, and are lost or injured by the common carrier, the husband, and not the wife, should sue.⁴

§ 570. **The same Subject; Right under a Bill of Lading.** — If the right to sue the carrier turned strictly upon legal ownership at the time of loss, this would be so hard a matter to determine conclusively in those modern instances where the title to inland freight, as well as that carried by water, is transferred in transit by symbol, that the delinquent carrier would too often profit by the misconception of plaintiff parties, and baffle their efforts; for legal ownership and the right to

¹ *Day v. Ridley*, 16 Vt. 48.

² *Sanford v. Housatonic R.*, 11 Cush. 155.

³ See *Hunter v. Westbrook*, 2 C. & P. 578; *Angell Carriers*, § 491; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

⁴ *Hawkins v. Providence, &c. R.*, 119 Mass. 596; *Furman v. Chicago R.*, 57 Iowa, 42.

demand the goods as consignee may change over and over while one transportation purpose is being accomplished. The better opinion, then, is decidedly to the effect that the shipper named in a bill of lading may sue the carrier for injury or loss of the goods, although he has no property, general or special, therein; for though some third party, not appearing in such document of title, might maintain his action against the carrier, it does not follow that the shipper cannot sue as upon his original contract with the carrier.¹ And if the shipper, under a bill of lading, can overcome any presumptions to the contrary, and show that he is the true owner of the goods therein described, he is doubtless entitled to bring the action in his own name.²

As concerns the assignee and transferee of goods under a bill of lading, wherever it is shown that the consignor was the consignee's agent, and shipped the goods for his principal's account or by his order, the consignee may doubtless maintain his action against the carrier.³ And where it is stated in such a document that the goods are consigned to a person named therein for his account and risk, the inclination appears to have been, in the older cases, to let the right of action go by legal ownership, rather than expect the shipper himself to sue.⁴ "There is no doubt," observes Shaw, C. J., further on this point, "that the party, who was owner at the time, or becomes owner of the goods afterwards, by assignment of the shipper or otherwise, and who was consignee, indorsee of the bill of lading, or lawful holder of a bill of lading in blank, and who really sustains the damage, may maintain an action

¹ See Shaw, C. J., in *Blanchard v. Page*, 8 Gray, 281, 289. But cf. *Sargent v. Morris*, 3 B. & Ald. 277; *Potter v. Lansing*, 1 Johns. 215.

² *Sargent v. Morris*, 3 B. & Ald. 77; *Price v. Powell*, 3 Comst. 322. And see *Moore v. Sheridine*, 2 Har. & M. 453, where the consignment was "to A or B." For suit by the assignee of an insolvent consignee, see *Mass. Loan & Trust Co. v. Fitchburg R. (Mass.)*, 9 N. E. 669.

³ *Blanchard v. Page*, 8 Gray, 281, 289.

⁴ *Ib.*; *Potter v. Lansing*, 1 Johns. 215.

against the ship-owner [carrier], not because he has any contract with him for the carriage, but because the ship-owner [carrier] has the goods lawfully in his possession; it has become his duty to carry them safely, and deliver them to the consignee; subject only to a lien for his freight; and if the consignee is ready to discharge that lien by a payment or tender of that freight, the refusal of the carrier to deliver the goods to such consignee is a breach of duty, and a wrong done him, for which an action, either in tort for the conversion, or in assumpsit upon the implied promise to perform such duty, may be maintained."¹ And we may conclude from the latest cases that, whatever the shipper's own right of action as such, the party who holds the bill of lading, as such bills are now usually availed of in inland or sea transportation, has a *prima facie* ownership of the goods sufficiently enabling him to sue the carrier for their loss or damage in transit.²

§ 571. **General Conclusion as to the Party Plaintiff.**—In general, the right of one to bring an action against the carrier, as a special rather than general owner, or by virtue of the carrier's promise or breach of public duty, will not exclude the real owner in interest from intervening and bringing suit in his own behalf in respect of the goods. Such is the usual principle pertaining to bailments. And hence a suit by the consignor, or by the consignee, might avail against a common carrier, where the other party, or some third person with claims paramount to both, had the right to step in and

¹ *Blanchard v. Page*, 8 Gray, 281, 289, per Shaw, C. J.

² *Barber v. Meyerstein*, L. R. 4 H. L. 317; *Shepherd v. Harrison*, L. R. 5 H. L. 116; *Burritt v. Rench*, 4 McLean, 325; *Arbuckle v. Thompson*, 37 Penn. St. 170; *Price v. Powell*, 3 Comst. 322; *Conard v. Atlantic Ins. Co.*, 1 Pet. 386, 445; *Angell Carriers*, §§ 503-512, and cases cited; *The Thames*, 14 Wall. 98. The tendency here is to permit one to sue, like the holder of negotiable paper, even though not the beneficial party in interest. In favor of other consignees and under inland bills of lading a similar right to sue has been recognized, though one is not the beneficial party. *Mobile R. v. Williams*, 54 Ala. 168. See also *Chaffe v. Mississippi R.*, 59 Miss. 182.

anticipate one's recovery of damages. The practical result of this would be that the carrier himself could not set up the plaintiff's want of interest or authority to bring the suit, but would have to respond fully to him on the legal assurance that one satisfaction on such a fair and *prima facie* showing of authority would debar any and all other possible parties in interest from pursuing him for the same delinquency;¹ and that a judgment once obtained in his favor on the merits of the case would, in like manner, conclude the potential as well as the actual plaintiff.²

But where the theory of general or special ownership is untenable, and one party holds himself out to the carrier as having no interest at all, the case is different; for the weight of authority favors the proposition that the person having both the right of property and the right of possession is the party to sue, whether consignor or consignee.³ And inasmuch as a delivery to an agent for and on behalf of his principal will transfer the property equally with a delivery to the principal himself, delivery may be made to a carrier as strictly on the consignee's behalf.⁴ What the conflicting decisions in England and the United States chiefly maintain, however, with some legal inconsistency, is that in doubtful cases the carrier shall not dispute the right of either consignor or consignee to bring the suit.⁵

¹ See *Nicolls v. Bastard*, 2 C. M. & R. 659; *supra*, as to other bailees; *Angell Carriers*, § 493; *Elkins v. Boston & Maine R.*, 19 N. H. 337; *Steamboat Farmer v. McCraw*, 26 Ala. 189.

² In *Green v. Clarke*, 12 N. Y. 343, this doctrine availed on behalf of a carrier as against the special owner, where the general owner had already sued and lost his case.

A release in full to the carrier by the consignor without authority from the consignee does not debar the latter from suing for damages. *City R. v. Chicago R.*, 63 Wis. 93.

³ *Potter v. Lansing*, 1 Johns. 214; *The Venus*, 8 Cr. 252; *Brandt v. Bowlby*, 2 B. & Ad. 932; *Woods, J.*, in *Blum v. The Caddo*, 1 Woods, 64.

⁴ 1 Woods, 64; 1 Atk. 248; 1 Johns. 15.

⁵ A mere borrower from the consignee, who had no privity with the carrier, cannot sue for loss or injury. 73 Ga. 472.

§ 572. **Party Defendant in Case of Loss or Injury.** — 3. Concerning the party defendant. It has already been observed that where the common carrier is sued for a loss or injury to the goods *ex delicto*, the non-joinder or misjoinder of parties defendant is not of vital consequence, whereas if the suit were *ex contractu*, such an error would be fatal.¹ In further considering the question against whom a suit should be brought, the principles brought into view in former chapters are to be remembered; so that one who seeks to bring his common-law action correctly must be careful to sue the principal carrier, — not the servant or subordinate; the person, firm, or company which, as public carrier, has the actual control, direction, and management of the transportation service hired by the customer, — not the mere proprietor of a route or vehicles; the actual bailee who holds himself out to accomplish the bailment purpose, — not his sub-bailee with whom the bailor had no privity.² All these points have been discussed in place already.³

But, on familiar principles, either the agent of an undisclosed principal may be sued, or the principal himself; and an undisclosed party may be held liable as the partner in fact of a carrier, whose personal responsibility was at stake in performing the public service he professed.⁴

Where, again, the agent or servant of a carrier so far exceeds the permitted and ostensible scope of his authority as to discharge the principal or master, or where one professes to be such an authorized servant or agent while he is not such, nor was held out by the true carrier as such at all, the party aggrieved by his conduct may sue him personally.⁵

¹ *Supra*, § 559.

² *Supra*, §§ 356-365.

³ As to the carrier to be sued where there is a line of connecting carriers, see *post*, c. 9.

⁴ Story Agency, §§ 161, 269, 270; *supra*, § 568; 1 Schoul. Pers. Prop. § 175.

⁵ *Supra*, §§ 356-358.

And if it appears that the contract was made with the carrier's servant alone, and independently of the true carrier, though this might not prevent the carrier himself from disaffirming the contract, and claiming the compensation for the service as his own, like any master whose servants another has sought to tamper with and corrupt, yet it is held that the servant, and not the carrier, must be sued for losing or injuring the thing so intrusted.¹

§ 573. **The same Subject; Master of a Vessel.**—The master of a ship or vessel has been regarded as a person of such vast and independent authority,—who must be greatly trusted by all having dealings with him, as chief executive in a hazardous transportation involving possible contingencies where his sole discretion must determine what should be done with ship and cargo, and an efficient representative of all concerned at distant ports,—that, upon considerations of convenience and public policy, these have long been considered personally liable as common carriers, by way of exception to the usual rules of agency, so that one suffering loss or injury of freight from some inexcusable cause can, at his election, proceed against either master or owner. This conforms to the tenor of the civil law, and, indeed, the almost universal law of nations.² Convenience, in this respect, however, regards chiefly the pecuniary responsibility of the defendant; and

¹ *Ib.* This rule has been applied to the driver of a stage-coach, who receives parcels. And, as against the owner of a vessel who makes a charter-party of which shippers are kept ignorant, see *The Figlia Maggiore*, L. R. 2 Ad. & E. 106.

Partners or joint associates in a common transportation may well be joined and made answerable for a loss therein occasioned, although some of them have no interest in the vehicle of transportation. *Ansell v. Waterhouse*, 6 M. & S. 835; *Fairchild v. Slocum*, 19 Wend. 329. This subject is more fully treated, *post*, c. 9. See *Aigen v. Boston & Maine R.*, 132 Mass. 423.

² *Morse v. Slue*, 1 Vent. 190; *Elliott v. Rossell*, 10 Johns. 1; *Abbott Shipp*, 5th Am. ed., 165, 300; *Angell Carriers*, §§ 518-520. And see *supra*, §§ 367, 404, 476, 563 *n.*

perhaps this rule concerning the master has its foundation in a general solicitude that one brought into such intimate contact with the customer by affreightment contract, bill of lading, and otherwise, shall have the ship where it may be bound firmly for the engagement, regardless of the owners, or their attempted qualifications of liability. The present tendency of the decisions appears to be against charging the master of a vessel unduly in a personal capacity for the acts and conduct of others which cannot be brought home to him, either as the principal contracting party, or as a wrong-doer; and this more especially where the injury or loss appears disconnected with the period of actual marine service.¹

§ 574. **The same Subject; Corporate Carriers.** — Various formalities are prescribed under local statutes with respect to suing joint-stock companies and corporations which have only a local operation. Thus, in New York, it is provided that suits against joint-stock companies shall, in the first instance, be prosecuted in the name of the president or treasurer; but that after judgment against the company, and the return of execution unsatisfied, the members may be sued individually; while, in Massachusetts, the members of the company may be sued as partners in the first instance.²

§ 575. **Declaration and Pleadings in such Suits.** — 4. Concerning the declaration and pleadings in cases of loss or injury. Inasmuch as the action against the carrier *ex delicto* is founded so nearly in what, from a different approach, might be called a contract breach of duty or misfeasance, difficulty may arise from drawing a declaration of a tenor unsuitable to

¹ See *Blaikie v. Stembridge*, 6 C. B. N. S. 894, 911; *Sandeman v. Scurr*, L. R. 2 Q. B. 86; *Walston v. Myers*, 5 Jones, 174. The master having been sued to judgment on a bill of lading, the owner cannot be sued, although the judgment is unsatisfied. *Priestly v. Fernie*, 3 H. & C. 977.

² See *Gott v. Dinsmore*, 111 Mass. 45, a suit against the "Adams Express Company." As to the liability of joint-stock companies generally, see 1 Schoul. Pers. Prop. §§ 215-246.

the form of action. Thus, averments of a "promise" or a "consideration," on the carrier's part, or of "an agreement," befit the action *ex contractu* rather than that on the case for tort, notwithstanding his "negligent conduct" and "misfeasance" be likewise relied upon;¹ and it is always important that the pleadings should correspond to the distinctive character of the action.² In laying the cause of action *ex delicto* on the custom of the realm, an express allegation that the defendant is a common carrier seems quite material; and a demurrer founded on a real omission of such allegation would probably be good;³ yet after a verdict against him, rendered upon proof of all the material facts, it may be too late for the defendant to raise the objection.⁴

The allegation of compensation or consideration need not be specific even in actions for a loss or injury *ex contractu*; and it is enough to allege that the consideration of conveying the particular property was a certain reward, or a reasonable hire and reward, without stating what that reward was.⁵ If the action is brought *ex delicto*, no allegation of a compensation or consideration paid, or agreed to be paid, ought to be made at all.⁶ The quantity and quality of the goods to be conveyed may be generally described without great nicety,

¹ See *Baylis v. Lintott*, L. R. 8 C. P. 345, distinguishing *Tattan v. Great Western R.*, 2 E. & E. 844.

² *Angell Carriers*, §§ 436-439. But as to the joinder of counts of contract and tort in local practice, see *supra*, § 562. See also 68 Ga. 344.

³ Averment that defendant is a corporation created by the laws of the State, and engaged in operating a railroad, and carrying corn and grain in cars furnished by itself, etc., is equivalent to an averment that it is a common carrier. *Toledo R. v. Roberts*, 71 Ill. 540.

⁴ *Pozzi v. Shipton*, 8 A. & E. 963. And see *Jones v. Pitcher*, 3 Stew. & P. 135. For insufficient allegation of right to sue where a consignor sued for non-delivery to his consignee, see 69 Ind. 18. And as to consignee who does not allege ownership, see 103 Ill. 553. See forms of declaration in 4 Rob. Prac. 780-783; 9 W. Va. 33.

⁵ *Angell Carriers*, § 446; *Clarke v. Gray*, 6 East, 564; *Ferguson v. Cappeau*, 6 Har. & J. 394; *Hall v. Cheney*, 36 N. H. 26; *supra*, § 373.

⁶ *Hall v. Cheney*, 36 N. H. 26; *Baylis v. Lintott*, L. R. 8 C. P. 345.

where the action does not rely upon a bill of lading, or other special instrument making a minute description of the property.¹ Where, in fact, the recovery sought is damages for an inexcusable loss or injury to a thing, and not, as in replevin, the thing itself, and where the plaintiff's ground of action is a breach of the carrier's general duty, or of some promise on his part, to be inferred from circumstances only and an off-hand delivery and acceptance, courts do not insist upon a very closely drawn declaration. The duty safely to convey and deliver, or the promise, may be set forth in general language; the grievance may be stated to be non-delivery within a reasonable time;² and it is not deemed material to set forth the particular means by which the loss occurred.³

§ 576. **The same Subject.** — But where the ground of action is a special contract qualifying the carrier's common-law risks, care should be taken to declare this contract correctly and specifically, and not set up material terms that were not therein contained, nor omit material terms, nor allege a different contract from that actually made, nor sue as for breach of one's duty and misfeasance as "common carrier," as though he transported in his public and unqualified capacity.⁴ Where the complaint in a suit against a common carrier counts upon a breach of his common-law liability, and the evidence shows a special contract, the variance is often held fatal;⁵ though as some cases contend, there is no real variance unless the suit

¹ 2 Saund. 74 *a*; Angell Carriers, § 447.

² See Raphael *v.* Pickford, 5 M. & G. 551; Peck *v.* Weeks, 34 Conn. 145; Angell Carriers, §§ 447, 448.

³ Raphael *v.* Pickford, *supra*; Williams *v.* Baltimore R., 9 W. Va. 33. Thus, in trespass on the case, the allegation that the goods "were, by the negligence of the carrier, wholly lost" to the plaintiff, is equivalent to an express denial of their delivery over. And see McCauley *v.* Davidson, 10 Minn. 418.

⁴ White *v.* Great Western R., 2 C. B. N. s. 7; Kimball *v.* Rutland R., 26 Vt. 247; Mann *v.* Birchard, 40 Vt. 326; Lake Shore R. *v.* Bennett, 89 Ind. 457; 90 Ind. 459.

⁵ 89 Ind. 457; Hall *v.* Pennsylvania Co., 90 Ind. 459. *Supra*, § 478.

was *ex contractu*.¹ A mere limitation of damages against him, as it were, by the carrier's special contract, need not, it is held, be noticed in pleading against him; but a stipulation that under circumstances, such as losses by fire or robbery, he shall not be liable at all, must be stated.²

§ 577. **The same Subject.**—In the declaration of an action against the carrier *ex delicto*, there might be a divisible averment, so that enough being proved to sustain the plaintiff's action, the other part of the charge might be treated as surplusage, and suffered to fail.³ But where the action is brought *ex contractu*, no such opportunity of division is afforded, for the contract must be proved materially as alleged.⁴ If the declaration in assumpsit states an absolute contract, and the proof establishes a contract in the alternative, or *vice versa*, this is a fatal variance, whether the plaintiff had the option, and has determined it, or it was left to the defendant.⁵ And where one terminus of the transportation is stated, and another is shown, the plaintiff must fail, unless such variance be nominal only, and not real.⁶

But, as good authorities have stated, the form of action, whether *ex contractu* or *ex delicto*, does not materially affect the evidence necessary to maintain it; and even when the declaration is in case, the contract with the carrier, or rather

¹ *Supra*, § 478; 102 Mass. 552; *Clark v. St. Louis R.*, 44 Mo. 440. In this last case it is said that the liability, where tort is alleged, does not arise from a special contract, but in spite of it. It may be worthy of note that our American rule does not favor the old English idea of a "special acceptance" by the carrier. See *supra*, § 450.

² *Abbott, C. J.*, in *Latham v. Rutley*, 2 B. & C. 20; *Angell Carriers*, § 416.

³ See *Butt v. Great Western R.*, 11 C. B. 140.

⁴ *Angell Carriers*, §§ 410, 441; *Hughes v. Great Western R.*, 14 C. B. 637; 1 Chitt. Pl. 334, 5th ed.; *Weed v. Saratoga R.*, 19 Wend. 534; 9 W. Va. 33.

⁵ *Penny v. Porter*, 2 East, 2; *Stone v. Knowlton*, 3 Wend. 374.

⁶ *Angell Carriers*, § 449; *Woodward v. Booth*, 7 B. & C. 301; *Tucker v. Cracklin*, 2 Stark. 385.

the particular duty from which the liability results, and on which it is founded, must be correctly, not incorrectly, stated. For, in an action on a tort arising out of a contract, a misstatement of the contract or a material variance in the proof is fatal, if it goes to the essence of the action; and where the plaintiff suing in tort goes into a detailed statement of his cause of action, he encounters a risk of vital discrepancy, similar to that of the plaintiff relying on the action of contract.¹

§ 578. **Proof in Suits for Loss or Injury.** — 5. Concerning the proof. We have indicated in former pages the evidence required on the part of a plaintiff in order to sustain his suit against a common carrier; the carrier's evidence in defence; also where the burden of proof lies in this, as in other bailments, at any particular stage of the case. The contract, express or implied, with the defendant carrier must be proven by the plaintiff, whether a tortious breach of duty or a breach of contract be relied upon; next, a bailment delivery of the goods; lastly, the carrier's failure to deliver the goods over at the journey's end, or his delivery of them in unsuitable condition, in which the alleged grievance consists.² A bill of lading, written receipt, check, or other token of acceptance, may well establish the contract and delivery; the receipt, of course, being open to explanation, but not special-contract terms of a document, admissible of themselves, and brought home, actually or by legal implication, to the bailor.³ The carrier may set up exemption under his special contract by way of exoneration, or defend on the general grounds of excuse which the common law admits.⁴

¹ See 2 Greenl. Ev. § 208; *Austin v. Manchester R.*, 16 Q. B. 600; *Ireland v. Johnson*, 1 Bing. N. C. 162; *Angell Carriers*, § 440; *Mann v. Birchard*, 40 Vt. 326; *Jordan v. Hazard*, 10 Ala. 221; *Stump v. Hutchinson*, 11 Penn. St. 553; *Toledo R. v. Roberts*, 71 Ill. 540, 542.

² *Supra*, §§ 23, 439, 478; *Angell Carriers*, §§ 461-467; *United States v. Pacific Express Co.*, 15 Fed. R. 867.

³ See *McCotter v. Hooker*, 4 Seld. 497; 81* Penn. St. 315.

⁴ *Supra*, §§ 23, 439, 478.

Proof of demand and refusal, or an apparent conversion, should place the carrier who is sued *ex delicto* sufficiently in the wrong to oblige him to clear himself; and in general, when non-feasance or negligence is charged upon the carrier, slight evidence in support of his allegation will suffice on the plaintiff's part, whatever the form of action.¹ But some evidence ought to be adduced, such as brings the default home to the carrier, and leaves it unlikely that others, for whose acts he is in no measure responsible, as, for instance, the customer or his agents, caused the loss or injury.² Nor can any

¹ *Chicago v. Dickinson*, 74 Ill. 249; *Angell Carriers*, 470.

² *Ib.*; *Morley v. Eastern Express Co.*, 116 Mass. 97; *supra*, § 439. As to the fact of non-delivery because the consignee could not be found, and the carrier's evidence on this point, see *Witbeck v. Holland*, 45 N. Y. 13. See, further, *South Alabama R. v. Wood*, 71 Ala. 215; 66 Ala. 167. The responsibility for short delivery is on the carrier, and the burden is on him if he seeks to exonerate himself. *Turnbull v. Citizens' Bank*, 16 Fed. R. 145. And though a special contract exempts the carrier from liability for injuries "from fire," he may be presumed negligent if he refuses to give any information as to how or where the fire occurred. 87 Penn. St. 395. And so generally may fault be imputed to a carrier if he refuses all explanation of loss or injury. *Kirst v. Milwaukee R.*, 46 Wis. 489. Where there is a contract limiting the carrier's liability to injuries caused by negligence, the burden is on him to show from what cause a loss or injury occurs. *Shriver v. Sioux City R.*, 24 Minn. 506; 28 Fed. R. 336.

But an apparent conflict in the authorities is noticeable, where goods are lost under a special contract of immunity from specified risks. Some courts put the burden pretty strongly on the plaintiff to show the defendant's negligence, such as the special contract cannot relieve. *Denton v. Chicago R.*, 52 Iowa, 161; *Little Rock R. v. Harper*, 44 Ark. 208. Others, again, pronounce it good policy to increase the carrier's burden, so that he should show both that the cause was within the excepted risks, and that he was not negligent in respect thereto, nor were his agents. *Chicago R. v. Moss*, 60 Miss. 1003; *Brown v. Adams Express Co.*, 15 W. Va. 812. Cf. 60 Miss. 1017; *Davis v. Wabash R. (Mo.)*, 1 S. W. 327. The difference of circumstances will, we think, help to correct the discrepancy. Thus, in *Denton v. Chicago R.*, the transit was completed, and the defendant stood rather in the posture of warehouseman, or hired bailee, than common carrier. And it would appear the better opinion that the carrier's proof of exculpation should go so far as to present, on his part,

loss of goods shipped or delivered at any other time than that alleged in the writ be admitted in proof.¹

some particular occasion of loss or injury, such as the common law or his special contract would excuse; which presentation of the facts, as he makes it, imputes to him and his servants no culpable negligence or default; and that having done this, he need not affirmatively prove further that he was not negligent, but rather leave this for the plaintiff to establish if he can. See *supra*, §§ 439, 478. The prolonged controversy in the courts over rules on this point, shows how stubbornly fought and how finely drawn are carrier suits at the present day.

In an action against the carrier for non-delivery of goods, although the allegation is a negative one if put in issue, the burden of proof is upon the plaintiff, and he must give some evidence of non-delivery, according to the obligation assumed by the carrier, before the latter is required to prove delivery. *Roberts v. Chittenden*, 88 N. Y. 33. But non-delivery being shown as a fact, a presumption of negligence on the carrier's part arises, and the burden is on him to show good excuse for non-delivery. 15 Fed. R. 686.

Where, again, the carrier delivers goods in a damaged condition, the onus is on him to show that he is not in fault, and the injury being shown, he is *prima facie* inculpated. But the plaintiff must first show the injury: and the injury must be such, by his presentment of the case, as to exclude all inference that the loss occurred otherwise than by the carrier's fault. Thus, to show that an animal transported by vessel was delivered in a sickly condition without external mark of injury, imputes nothing more than the natural effect of a voyage upon a feeble creature, and this does not sufficiently charge the carrier. *The Saragossa*, 3 Woods, 380. And if in a suit for animate or inanimate property the damage might as well be attributed to natural causes as to negligence, the plaintiff cannot recover. *Ocean S. S. Co. v. McAlpin*, 69 Ga. 437. Where, on the other hand, a bill of lading shows the package to have been in good condition when shipped, and the proof shows that the goods were properly packed, and the damage of a kind not likely to have been due to an excusable peril, the burden is on the carrier to account for the injury. 28 Fed. R. 336. A consignee's receipt for the goods on their delivery over, as being in good order, is *prima facie* evidence in the carrier's favor. *Ocean S. S. Co. v. McAlpin*, 69 Ga. 437. And where the loss or injury was not discovered until after the delivery over at the journey's end, the burden is on the plaintiff to show that it must have occurred before the bailment ended; as, for instance, if jewelry was abstracted from a box and nails were redriven, and yet the plaintiff fails to show

¹ *Witzler v. Collins*, 70 Me. 290.

The common law disqualifies interested parties from testifying in their own behalf; but this disqualification is, to a considerable extent, removed by modern legislation, which favors, on the whole, the admission of all interested parties to the witness-stand, leaving to the cross-examination of opposing counsel, and the equal opportunity for parties to confront and contradict one another, the means of eliciting the whole truth.

§ 579. **The same Subject.**—The defendant to the action *ex delicto* pleads, by way of general issue, “not guilty,” or words of other form which amount to such a plea; and under this general issue a carrier may prove most matters of defence allowable in action on the case.¹ But “not guilty” operates as a denial of inexcusable loss and damage, and not of such special matters as the acceptance of the goods by himself; though a loss proximately by act of owner or customer, as, for instance, by the consignor’s own negligence, ought apparently to be available to the carrier on such a plea as well as loss by act of God or of a public enemy.²

what care was taken of the box from the time the box was delivered over to the discovery of the loss. *Canfield v. Baltimore R.*, 75 N. Y. 144.

Proof of actual payment, or of an express promise to pay, freight on the goods, is not, in general, requisite in order that the consignor or owner may maintain his suit against the carrier; for the willingness to pay is readily presumed. *Hall v. Cheney*, 36 N. H. 26; *Ferguson v. Cappean*, 6 Har. & J. 394. And, on the more formal points, slight evidence will often suffice to make out his *prima facie* case against the common carrier. *Chicago R. v. Dickinson*, 74 Ill. 249.

While the presumption as to an injury or loss sustained between the time of the carrier’s reception of the goods and the time of their rightful delivery is that it should be attributed to his default, the carrier may show that the loss or injury proceeded from some previous and non-apparent cause; and this, notwithstanding the bill of lading or other document acknowledges their receipt in good condition. *Choate v. Crowninshield*, 3 Cliff. 184.

¹ *Elwell v. Grand Junction R.*, 5 M. & W. 669; *Wyld v. Pickford*, 8 M. & W. 413; *Hoyt v. Allen*, 2 Hill, 322; *Angell Carriers*, §§ 451, 452.

² Cf. *Holden v. Liverpool Gas Co.*, 3 C. B. 1; *Webb v. Page*, 6 Scott, N. R. 951.

Where the action is brought *ex contractu*, the general plea "non assumpsit" operates as a denial of any contract to the effect alleged in the declaration, and of any such bailment as would raise a promise in law to the effect claimed by the plaintiff.¹ But, as it would appear, the general denial does not here extend to special matters in avoidance of liability upon which the carrier means to rely.² Admissions of the carrier, or of his servant acting within the scope of his agency, which relate immediately to the loss may, as part of the *res gestæ*, be of much avail to the plaintiff;³ while, on the other hand, there has been much difficulty found in drawing the line between those cases where, under the old rules of evidence, a carrier's servant could, and where he could not, be admitted to testify on his employer's behalf, without procuring a release, so as to make sure that the carrier, if held liable to the customer, would not turn round and sue him personally.⁴ The owner of the thing lost may qualify himself as a witness for the special bailee, by releasing to the latter his interest therein; otherwise he, too, is an incompetent witness for the plaintiff, upon the same general principle.⁵

¹ Dale v. Hall, 1 Wils. 281; Angell Carriers, §§ 455-459; Gatcliffe v. Bourne, 4 Bing. N. C. 314.

² See Houston R. v. Harn, 44 Tex. 628, where the carrier meant to rely specially upon the plaintiff's release of the contract for shipment of the articles, or only a partial loss. And, as to a limitation under his special contract, see Westcott v. Fargo, 61 N. Y. 542. And see, generally, Deming v. Railroad, 48 N. H. 455.

³ Kirkstall Brewery Co. v. Furness R., L. R. 9 Q. B. 468, and cases cited; Angell Carriers, § 468, 5th ed., Lathrop's note; Burnside v. Grand Trunk R., 47 N. H. 551; Morse v. Conn. River R., 6 Gray, 450; Lane v. Boston & Albany R., 112 Mass. 455. Where the acts of the agent will bind his principal, there his representations, declarations, and admissions respecting the subject-matter will also bind him if made at the same time, and constituting a part of the *res gestæ*. Story Agency, § 134; *supra*, §§ 357, 358. But not loose general admissions against the carrier who employs him. 140 Mass. 510.

⁴ Angell Carriers, § 469; 1 Greenl. Ev. §§ 394, 476; Moran v. Portland Steam Packet Co., 35 Me. 55; Bailey v. Shaw, 4 Fost. 297.

⁵ *Ib.*

§ 580. **The same Subject; Proof of Contents of Trunk, etc.** — On the principle of necessity, the usual rule of disqualification has been relaxed in a particular case; namely, that of the loss of some trunk or closed receptacle with its contents, where only the plaintiff or party in interest can disclose what those contents were, and the circumstances in connection with the bailment and the original contract fail to establish the fact. As to the extent of this exception, however, the authorities are not clear and harmonious; though, independently of legislation, the better authority tends to confine it to cases where no other certain testimony, less *ex parte* in character, is accessible. In the bailment of freight in large amount and of considerable value, under a bill of lading or other similar document, the recitals of the instrument evince the mutual understanding on this point; and in general the application of the rule to freight must, at best, be quite a narrow one.¹

§ 581. **Sufficiency of Evidence.** — If there be some evidence which tends to prove all the material allegations on the plaintiff's part, the sufficiency thereof is usually to be left to the discretion of the jury, our courts being disposed to favor the consignor or consignee, upon even slight proof of material facts not disproved by the other party; but where there is a fatal variance between the proof and the allegations, or where there is no evidence whatever on some material point necessary to be proved in order to make out the cause of action, the court, on motion of the defendant, should order a non-suit.²

¹ See *Butler v. Basing*, 2 C. & P. 613; *Doyle v. Kiser*, 6 Ind. 242; *Wright v. Caldwell*, 1 Mich. 51. The exception is held in *Adams Express Co. v. Haynes*, 42 Ill. 89, not to apply at all to the transportation of freight; not even to that of a trunk by an express company. And see *Bingham v. Rogers*, 6 W. & S. 495; 22 Ill. 278; 12 Ga. 217; Part VII. c. 4, where the rule is applied to baggage.

For this rule, as applied in a suit against an innkeeper for loss of a trunk, see *Spurr v. Wellman*, 11 Mo. 230.

² See *Ringgold v. Haven*, 1 Cal. 108; *supra*, § 577; *Morley v. Eastern*

Where evidence of the carrier's negligence is conflicting the court will not set forth rules¹ as supposing certain facts were proved, but submit all the evidence to the jury.¹

§ 582. **Damages recoverable for Loss or Injury.**—6. Concerning the damages recoverable against the carrier in suits for loss or injury on the transportation. The principle is that the plaintiff or rightful party must be fully indemnified against such pecuniary damage as he sustains by the carrier's inexcusable breach of duty or of contract, so far as this damage is consequential upon the carrier's undertaking in question by a reasonable construction of its terms. Hence, the general measure of damages, in case of such loss or injury by the carrier, is the value of the goods at the place of delivery at the time they should have been delivered; and market value is, apart from contract, the common test of value.² Whether

Express Co., 116 Mass. 97; *Lane v. Boston & Albany R.*, 112 Mass. 455; *Deming v. Railroad*, 48 N. H. 455; U. S. Digest, 1st Series, Carriers, 223-248.

¹ *Aigen v. Boston & Maine R.*, 132 Mass. 423; 128 Mass. 221.

² Angell Carriers, §§ 482-490, 5th ed., Lathrop's note; U. S. Digest, 1st Series, Carriers, 249-262; *Ringgold v. Haven*, 1 Cal. 108; *Parmelee v. Fischer*, 22 Ill. 212; *Hackett v. Boston R.*, 35 N. H. 390; *Smith v. Griffith*, 3 Ill. 333; *Dean v. Vaccaro*, 2 Head, 488; *Peet v. Chicago R.*, 20 Wis. 594; *Sherman v. Hudson River R.*, 64 N. Y. 255. This principle is applied, where gold coin is lost at a time when it commands a premium in the market, in *Cushing v. Wells*, 98 Mass. 550. Punitive damages are not, in general, allowable in suits of the present character, unless misconduct appears. *Toledo R. v. Roberts*, 71 Ill. 540; *Wall v. Cameron*, 6 Col. 275. Under counts against the carrier merely as carrier or bailee, the plaintiff cannot recover for losses specially resulting from the misrepresentation or deceit of the carrier's agent. *Maslin v. Baltimore R.*, 14 W. Va. 180; *Mitchell v. Georgia R.*, 68 Ga. 644; 44 Ark. 439.

As to damages under a contract limiting the amount for so much per box, package, etc., see 93 Ill. 523. A just valuation in case of loss might be imposed by contract in advance; or a reasonable limit to the time of making claims for damages. *Supra*, § 457. But if the goods were accepted at some intermediate point, the actual loss sustained by the owner, under the circumstances, is the point at issue. *Supra*, § 505; *Bowman v. Teall*, 23 Wend. 306. If the loss occurs before the transportation commences,

the suit be framed *ex contractu* or *ex delicto* the same general rule applies, and the measure of damages is equally within the control of the court.¹

Since, too, the action for non-delivery against the carrier may be supported by proof of only partial delivery, the defence of partial delivery, if such property has been delivered or tendered, goes only in mitigation of the damages against the carrier.² And where goods are delivered but not in good condition, the carrier is liable for the difference between their actual market value at the time and place of delivery, and the sum which would represent their value were they delivered uninjured.³

For negligent delay and culpable default in transporting the goods, so that there is a loss incurred by their depreciating in value, the measure of damages against the carrier is the difference between the value of the goods to the owner or proper party at the place of delivery at the time they ought to have arrived, and their value at the time they in fact arrived,⁴ a reasonable time being allowed for their delivery.⁵ The carrier's unreasonable delay in delivering the goods is no defence to his action for freight, without some proof of the

the value of the goods at the place of delivery to the carrier appears commonly to be the measure of damages; for at this cost the consignor may commonly replace them. This rule is applied to transportation by vessel in *Lakeman v. Grinnell*, 5 Bosw. 625; *Krohn v. Oechs*, 48 Barb. 127.

¹ *Baltimore R. v. Pumphrey*, 59 Md. 390.

² *Houston R. v. Harn*, 44 Tex. 628; *Deming v. Railroad*, 48 N. H. 455. See *McHenry v. Railroad*, 4 Harring. 448.

³ *Jellett v. St. Paul R.*, 30 Minn. 265; *The Mangalore*, 23 Fed. R. 463. And see 29 Fed. R. 530.

⁴ *Deming v. Railroad*, 48 N. H. 455; *Ingledeu v. Northern R.*, 7 Gray, 86; *Cutting v. Grand Trunk R.*, 13 Allen, 381; *Ward v. New York Central R.*, 47 N. Y. 29; *Texas R. v. Nicholson*, 61 Tex. 491; 46 Ark. 485; *Newell v. Smith*, 49 Vt. 255, 266, per Powers, J.; *Scott v. Boston, &c. Steamship Co.*, 106 Mass. 468; *Weston v. Grand Trunk R.*, 51 Me. 376; *Devereux v. Buckley*, 34 Ohio St. 16; (Tenn.) 1 S. W. 620. See *Nettles v. South Carolina R.*, 7 Rich. 190.

⁵ See *Sherman v. Hudson River R.*, 64 N. Y. 254.

damage thereby sustained ; such as their fall meantime in the market value ;¹ though for actual damage occasioned by his unreasonable and unexcused delay, the carrier may doubtless be held answerable.²

In computing the damages it is now quite common to add interest from the time when delivery was due or a demand made, if this be needful to make the plaintiff whole ;³ though the allowance of interest upon what may be called unliquidated damages was not formerly favored.⁴

§ 583. **The same Subject.** — But the rule of damages against the carrier awards, in favor of the aggrieved consignor or owner, only such damages as the contract or the circumstances of the particular bailment fairly contemplated as the natural result of such delinquency and non-fulfilment. And hence, if the article be desired for some special purpose, so as to render the loss, injury, or delayed carriage of the thing unusually disastrous to the party entitled, the fact ought to have been specially stated or notified at the outset, so as to form part of the mutual agreement for transportation, else the plaintiff cannot afterwards claim to have it enter as an element into the computation of damages.⁵ But, subject to this duty on

¹ *Page v. Munro*, 1 Holmes, 232.

² *Supra*, §§ 488, 489.

³ *Spring v. Haskell*, 4 Allen, 112; *Smith v. Whitman*, 13 Mo. 352; *Newell v. Smith*, 49 Vt. 255; *Robinson v. Merchants' Desp. Trans. Co.*, 45 Iowa, 470; *Murrell v. Dixey*, 14 La. Ann. 298; *Caldwell v. Southern Express Co.*, 1 Flip. 84.

⁴ *Angell Carriers*, § 484.

⁵ *Hadley v. Baxendale*, 9 Ex. 341; *Great Western R. v. Redmayne*, L. R. 1 C. P. 329; *Woodger v. Great Western R.*, L. R. 2 C. P. 318; *Chicago R. v. Hale*, 83 Ill. 360, and cases cited. In *U. S. Express Co. v. Root*, 47 Mich. 231, this rule was applied where a concert singer claimed that by reason of delay in receiving a package of posters, which were sent by express, the arrangements for her performance were cancelled. In *Mather v. American Express Co.*, 138 Mass. 55, damages for the carrier's loss of an architect's plans were confined to replacing them; the consequent delay in constructing a house constituting no element of indemnity, where the carrier had no notice of the contents or intended use of the

the customer's part, he may recover for special damage where the special responsibility was properly and seasonably brought home to the carrier so as to form part of the original contract.¹

Certain articles, as, for instance, wearing-apparel and family relics, are not fairly compensated by a rule of damages which is deduced from the computation of market rates.² Thus, the measure of damages for loss of a family portrait is the actual value of the portrait to the plaintiff.³

§ 584. **The same Subject.**—Where the carrier pays or settles with the owner as for a total loss of the goods transported, the property therein becomes in law and conscience transferred to him, and inures to his benefit.⁴

§ 585. **Remedies for Negligence or Misconduct in Final Delivery.**—III. Where the carrier acts negligently or wrongfully in delivering the goods over after his transit is completed.

package. Injury to the plaintiff's business, by reason of non-delivery, is too remote for consideration, *per se*, in assessing damages. *Baltimore R. v. Pumphrey*, 59 Md. 390. And unless a carrier has been notified of the urgent necessity for prompt carriage, his negligent delay renders him liable only for the usual and ordinary damages. 62 Tex. 639.

Where damages are merely nominal, only nominal damages will be awarded. See 1 Woods, 131, as to a carrier's misdelivery to one who delivered promptly to the right party. Where by bad stowage the article is wholly spoiled for commercial purposes, the carrier is liable accordingly; as by placing sacks of salt near powdered arsenic. 16 Blatchf. 516.

If a vessel capsizes before sailing and injures goods thereby, the carrier ought not to make a peremptory sale without consulting the owner. *Abb. Adm.* 215; *supra*, § 401.

¹ *Ib.* See *British Columbia Sawmill Co. v. Nettleship*, L. R. 3 C. P. 499; *Cutting v. Grand Trunk R.*, 13 Allen, 381; *Deming v. Railroad*, 48 N. H. 455; 31 Kan. 385; *Grindle v. Eastern Express Co.*, 67 Me. 317. Speculative profits, peculiar to a plaintiff's business and unknown to the carrier, should not be reckoned. *Bazin v. Steamship Co.*, 3 Wall. Jr. 229.

² *Denver R. v. Frame*, 6 Col. 382. Cf. 61 Tex. 550. For this rule, as applied to lost baggage, see *post*, Part VII. c. 4.

³ *Green v. Boston & Lowell R.*, 128 Mass. 221. And here it may be shown that the portrait was the only one, and cannot be replaced. *Ib.*

⁴ *Hagerstown Bank v. Adams Express Co.*, 45 Penn. St. 419.

What has been said under the preceding subdivision of this chapter may furnish the guiding principles where a remedy is sought in the present instance. But the rule itself may have a peculiar application: as in the case where the goods arrive safely, but the carrier neglects his duty in respect of notifying or trying to find the consignee, and meanwhile they spoil or depreciate in market value;¹ or where he unreasonably delays or refuses to make such delivery as his undertaking bound him to make,² or makes a misdelivery.³ So may a carrier who has performed his public duty be held responsible on the footing of a warehouseman or lesser bailee.⁴

That payment of freight is due, on the one hand, when the goods reach their destination, and a delivery to the proper party on the other, so that neither party can demand priority of performance, we have already seen;⁵ and hence that assumpsit for the carrier's breach of contract may lie where the consignee has put him in the wrong, or even trover, as for an act of conversion.⁶ But replevin may sometimes be the more convenient means of getting possession of the goods, and determining the true title, where the carrier wrongfully refuses to give up the goods;⁷ which form of action, however, is not in theory well applied to the mere unjust detention of goods received and held on a contract.⁸

§ 586. **The same Subject; Effect of Acceptance.**—An acceptance of goods in whole or in part, by the owner, short of the place of delivery originally intended, bars his action

¹ *Zinn v. New Jersey Steamboat Co.*, 49 N. Y. 442.

² See *Chicago R. v. Stanbro*, 87 Ill. 195.

³ *Supra*, § 490. For the measure of damages, where the carrier wrongfully refused delivery, see 4 Fed. R. 548. And see *Mass. Loan & Trust Co. v. Fitchburg R. (Mass.)*, 9 N. E. 669; 1 Woods, 131.

⁴ See *Anderson v. North-Eastern R.*, 9 W. R. 519.

⁵ See *supra*, §§ 552, 553.

⁶ *Ib.*

⁷ *Dyer v. Grand Trunk R.*, 42 Vt. 441; *supra*, § 552; *Boston R. v. Brown*, 15 Gray, 223.

⁸ See *Abbott Law Dict.* "Replevin."

against the carrier for damage or loss thereto if subsequently occasioned; but such acceptance constitutes no bar to his action for their inexcusable loss or damage if occasioned previously.¹ And, in general, the mere acceptance of goods by the consignee or owner, or any lawful retaking of the same from the carrier by the proper party before or at the time and place when the transit is completed, does not estop him from claiming damages; nor does his payment of freight or submission to a judgment therefor;² for nothing short of a release, on his part, or full satisfaction, can thus operate upon his right of action.³

§ 587. **Recovery of Extortionate or Illegal Charges.** — Where the carrier makes extortionate or illegal charges, either in advance of carriage or at the termination of the transit, the party entitled to due performance, who pays the same under protest, may sue for the unlawful excess in an action for money had and received.⁴ Indeed, it is held that the injured party need not even have paid under protest, so long as he did not voluntarily submit to the extortion.⁵ But a bill in equity to recover overcharges is not maintainable.⁶

§ 588. **Conflict of Laws in Pursuit of Remedies.** — In the pursuit of remedies, by or against a carrier, one may be confronted by a conflict of laws of different States or countries.

¹ *Bowman v. Teall*, 23 Wend. 306; *Lowe v. Moss*, 12 Ill. 477; *Cox v. Peterson*, 30 Ala. 608; *Atkisson v. Castle Garden*, 28 Mo. 124.

² *Schwinger v. Raymond*, 83 N. Y. 192.

³ *Ib.* And see *supra*, c. 6. One may pay freight and sue for damages, or set up his damages by way of counter-claim in an action to recover the freight, or he may bring a cross-action. 83 N. Y. 192.

⁴ *Great Western R. v. Sutton*, L. R. 4 H. L. Cas. 226; *Garton v. Bristol R.*, 1 B. & S. 112. See *Wilson v. Harry*, 32 Penn. St. 270.

⁵ *Heiserman v. Burlington R.*, 63 Iowa, 732. Cf. 100 N. Y. 194, where payment is made without objection. See, for English and American legislation as to unfair and excessive charges, etc., *supra*, §§ 375, 485.

⁶ Not even though several companies are thus liable. *Scott v. Erie R.*, 34 N. J. Eq. 351. If a carrier charges extortionately and refuses to deliver, the consignee who tenders freight money is not bound to keep his tender good. *East Tennessee R. v. Hunt*, 15 Lea, 261.

When a contract is made in one State or country to transport goods over a line extending through two or more States or countries, and loss or injury occurs, it is held that the rights of the parties will be governed by the laws of the State or country where the loss or injury happened.¹ But, as a general rule, a personal contract is supposed to have been entered into with reference to the law of the place where made; and if formalities are there requisite to give it validity, those formalities must have been observed; the law of the place of contract determines the right.² On the other hand, the law of the place where the action is brought generally regulates the remedy; and hence prescribes the modes of proof by which the terms of the contract are made known to the court, as well as the form of the action by which it shall be enforced.³ But the law of the place of performance must frequently determine the mode of fulfilling such a contract, and the measure of liability for its breach.⁴

¹ *Barter v. Wheeler*, 49 N. H. 9; *Gray v. Jackson*, 51 N. H. 9.

² *Milwaukee R. v. Smith*, 74 Ill. 197.

³ *Colt, J.*, in *Hoadley v. Northern Trans. Co.*, 115 Mass. 304. In this case, the forum of the remedy was held to determine what should be evidence of the assent of the shipper to a bill of lading; though this decision in effect nullified the law of the State where the contract was made. See also *Gott v. Dinsmore*, 111 Mass. 45.

⁴ *Brown v. Camden R.*, 83 Penn. St. 316.

CHAPTER IX.

CONNECTING CARRIERS.

§ 589. **Topic to be here considered.**—A topic which involves at this day problems of great intricacy remains for a final investigation. The law of connecting carriers absorbs the principles set forth in our preceding chapters, and then leads us into a deeper labyrinth, where the aspect of liability presented is that of two or more adjoining lines engaged in some continuous transportation of goods and chattels. What reciprocal rights and responsibilities as between carrier and customer pertain peculiarly to this connecting and continuous transportation, this concluding chapter will consider; and we may premise that American States have formulated independent rules under this head so greatly at variance with one another and with English precedent as seriously to embarrass the private individual who seeks redress for loss or injury. Whether something like a uniform standard is attainable for this country under the influence of inter-State commerce acts and the grasp of a national commission is an experiment soon to be tested.¹ Meanwhile, by the process of lease and consolidation during the past few years, this problem, with others, has sought its own practical solution, through the combination of connecting inland carriers by railway and steamer into trunk lines of lessening number and increasing magnitude, so as to supplant by a single responsible and economical management the control which was formerly diffused among various companies independent of one another. For while a monopoly badly directed is a sure curse to the community, a well-directed one may prove no less a blessing;

¹ See U. S. Inter-State Commerce Act (1887) in Appendix, *post*.

and in taking our chances between the two we gain at least the advantage of concentrating the public vigilance upon more definite objects.

§ 590. **Nature of Carriage by Connecting Routes; Principle of Partnership or Mutual Agency.** — The nature of this carriage by connecting routes brings natural principles into view associated with the responsible calling of a common carrier. We have seen that the responsible party who undertakes the business of transportation must always be considered; that it is the person or persons having possession, control, and authority in the bailment performance, with whom a consignor deals, and whose functions should be distinguished from the mere agent, officer, or employé who receipts for the goods and transports them in this subordinate capacity; and that this responsible common carrier, though employing many agents or servants, may be an individual, a partnership, or a company.¹

Now the doctrine of connecting carriers, in the new and enormous business traffic by land and water to which steam transportation has given rise during this nineteenth century, extends the general doctrines of partnership and agency, which courts, English and American, applied to stage-coaching arrangements, more simple but similar, some eighty or a hundred years ago.² At the present day, where railroad and other steam carriers connect on a continuous route, the doctrine of agency supplements that of partnership in determining the nature and limits of each carrier's liability. We may assume that if a carrier company which owns, by consolidation, or is the responsible lessee of various connecting carriage routes undertakes a transportation, this company is essentially the only carrier for the entire distance. Or, again, if there is a partnership of carriers, — a relation less strictly to be affirmed

¹ *Supra*, §§ 359-365.

² *Supra*, § 364; *Waland v. Elkins*, 1 Stark. 272; *Fairechild v. Slocum*, 19 Wend. 329; s. c. 7 Hill, 292.

of companies than of individuals, — the partners are liable together by reason of their community in traffic. But once more, to take the status of the case as usually presented, the doctrine of agency supplements that of partnership for a through carriage. And here the carrier who receives goods and chattels for some point beyond his own terminus takes the property (1) as a principal who employs the connecting carriers as his own agents, and thus makes himself responsible for the whole distance ; or (2) as the agent of himself and the connecting carriers, namely, so as to be principal and responsible bailee for his own route ; each connecting carrier being in like manner a principal and responsible bailee for his share of the journey.

Some one may, without being a responsible carrier at all, offer himself as an agent of various connecting carriers who must severally answer for losses on their own lines ; being thus a mere forwarder and no carrier.

§ 591. **The same Subject ; how held out to the Public, the Main Consideration.** — The main consideration in determining the true status of a connecting carrier, as among the foregoing theories, is this : how did the carrier hold himself out, or permit himself to be held out, to the public ? And this is a consideration which fundamentally obtains whether of the partnership or agency relation. For though a dormant or secret partner or an undisclosed principal, when discovered, may be sued by an injured party, it is a familiar principle that one who offers or allows himself to be offered as a partner or principal must abide the consequences, and cannot shield himself against the claims of those who contracted upon the faith of such offer by setting up any private and secret arrangements with the parties who used his name by way of disputing or modifying his open risks. For such arrangements avail only as among the parties themselves and those in privity with the arrangement.

Inasmuch as an undisclosed principal or a secret partner,

who was such in point of fact, is liable to the public on general principle, because of his community of interest, an arrangement between connecting carriers in the nature of a partnership or a mutual agency may be shown to charge a carrier for losses which occur outside his own route, and for which he assumed no direct or positive relation towards the customer. But while arrangements of this kind are sometimes exposed in the courts, more especially for confirming a liability which other evidence tended to fasten immediately upon such a carrier, as of a party held out in a measure for the undertaking by his own permission, they are treated with disfavor where the carrier afforded no such reliance to the customer when the transportation was undertaken.¹ Such private arrangement, or, indeed, any special contract by one carrier to transport over other lines must, at all events, be established by proof. And what the law favors in all such controversies is liability, first of all, for a loss occasioned on one's own route, and while the goods were in one's own possession; next, liability on another, and especially the receiving route, when a through liability was clearly assumed by such carrier.

§ 592. **The same Subject; Partnership Arrangements.**— Thus, the company on whose line a loss occurs may be sued on the ground that the receiving company which contracted for the through carriage of the chattels was, if not in the full sense a partner, at least its agent, duly empowered, on its behalf, to make a binding agreement.² But where the arrangement between several connecting railways is, in effect, that goods to be carried over the whole route shall be delivered by each to the next succeeding company, and that each

¹ See *Insurance Co. v. Railroad Co.*, 14 Otto, 146; *Stewart v. Terre Haute R.*, 1 McCr. 312; *Aigen v. Boston & Maine R.*, 132 Mass. 423; *Whitworth v. Erie R.*, 87 N. Y. 413; *St. Paul R. v. Minneapolis R.*, 26 Minn. 243; 21 Fed. R. 25.

² *Gill v. Manchester, &c. R.*, L. R. 8 Q. B. 186.

company so receiving shall pay the preceding company the carriage charges already due, and the last one shall collect the whole from the consignee, this, it is held, will not make the last company liable on receiving the goods and paying the charges of its predecessors, for an injury done to the goods before it received them.¹ Here, however, appears no partnership, no agreement for a community of profits in the entire carriage; for, were there such, the arrangement might be treated as rendering both the receiving company and the company causing the loss liable for a loss occurring anywhere on the transit, and perhaps any and all of the carriers.² And it may be generally stated that where carriers associate together, without taking a common name or entering into a close community of profits, but with the purpose merely of transporting through freights and dividing the receipts in prescribed proportions according to distance, they do not constitute a partnership, nor are they jointly liable for loss or injury occurring to the goods transported.³ Not even the advertisement of the connecting carriers as forming a line under a common name and the employment of a common agent will sufficiently charge them as partners to the public.⁴

¹ *Darling v. Boston & Worcester R.*, 11 Allen, 295; *Gass v. New York, &c. R.*, 99 Mass. 220. And see *Wilson v. Harry*, 32 Penn. St. 270; *Schneider v. Evans*, 25 Wis. 241; *Hunt v. New York R.*, 1 Hilt. 228. Where each company by the mutual arrangements bore the expenses of its own route and of all transportation over it, and a division, upon the basis of distance, of the aggregate pay for the entire route was stipulated, this was held not to make these companies partners *inter sese*, nor partners as to third persons. *Insurance Co. v. Railroad Co.*, 14 Otto, 146.

² *Fitchburg & Worcester R. v. Hanna*, 6 Gray, 539; *Champion v. Bostwick*, 18 Wend. 175; *Fairchild v. Slocum*, 19 Wend. 329; *Montgomery R. v. Moore*, 51 Ala. 394.

³ *Insurance Co. v. Railroad Co.*, 14 Otto, 146; *Hot Springs R. v. Trippe*, 42 Ark. 465; *Darling v. Boston & Worcester R.*, 11 Allen, 295.

⁴ *Citizens' Ins. Co. v. Kountz Line*, 4 Woods, 268. Here there was no community in profits or losses, nor common use of vehicles, and the

But where several carrier companies having connecting lines between two points form an association under a specified name, for the carriage of goods from one point to the other, and their agent duly authorized receives goods and gives a bill of lading in the name of that association, they are partners, so far as the customer is concerned, and may be held liable jointly and severally for any loss occurring in the transportation;¹ supposing, of course, no special terms in the bailment impose a different liability. More especially does this hold where the contract is to carry goods through at an agreed price, which the customer pays in one sum, and the carriers divide among themselves after the manner of partners.²

§ 593. **Through Contract may be made; Ultra Vires not presumed.**—Railway and other transportation companies have undoubtedly at the present day the power, unless forbidden by their charters, to contract for transportation for an entire distance, beyond their own routes, and over any connecting lines. Such is the well-settled rule, both in the United States and in England.³ In such a case the company is liable in all other respects upon the other lines as upon its own; and the public has a right to assume that the contracting company has made all the arrangements necessary to the proper fulfilment of the obligations it thus assumes.⁴ Carriers, to speak more generally, whether natural or legal persons, may so bind themselves to deliver goods and chattels beyond the strict bill of lading issued was in the name of one of the associated carriers alone.

¹ *Block v. Fitchburg R.*, 139 Mass. 308; *Hill Man. Co. v. Boston & Lowell R.*, 104 Mass. 122. And see *Milne v. Douglass*, 4 McCr. 368.

² 4 Mo. App. 35.

³ *Muschamp v. Lancaster R.*, 8 M. & W. 421; *Bristol R. v. Collins*, 7 H. L. 191; *Gill v. Manchester R.*, L. R. 8 Q. B. 186; 7 H. & N. 986; *Railroad Co. v. Pratt*, 22 Wall. 123, and cases cited; *Weed v. Railway Co.*, 19 Wend. 531; *Knight v. Portland R.*, 56 Me. 234; *Buffett v. Troy R.*, 40 N. Y. 168; *Southwestern R. v. Thornton*, 71 Ga. 61.

⁴ *Ib.*; Mr. Justice Swayne, in *Railway Co. v. McCarthy*, 6 Otto, 258.

limits of their line as only to exonerate themselves by a safe carriage through the entire journey.¹

Nor is such a contract when made by a chartered company to be presumed *ultra vires*. Corporations are supposed to contract within their just powers; and the doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. When, therefore, a contract is not on its face necessarily beyond the scope of the powers of the corporation by which it was made, it will be presumed valid until the contrary is proved.²

As we shall presently see, the only question here of great consequence relates to the circumstances which shall evince this through undertaking on the carrier's part; and here, unfortunately, the English and American authorities are quite inharmonious.

¹ Railroad Co. v. Androscoggin Mills, 22 Wall. 594; Lock Co. v. Railroad, 48 N. H. 339; Hill Manuf. Co. v. Boston & Lowell R., 104 Mass. 122; Noyes v. Rutland R., 27 Vt. 110; Baltimore Steamboat Co. v. Brown, 54 Penn. St. 77.

² Mr. Justice Swaine, in Railway Co. v. McCarthy, 6 Otto, 258; Union Water Co. v. Flumming Co., 22 Cal. 620; Morris R. v. Railroad Co., 29 N. J. Eq. 542; Whitney Arms Co. v. Barlow, 63 N. Y. 62; Wilby v. West Cornwall R., 2 H. & N. 703; 54 Penn. St. 77; Perkins v. Portland R., 47 Me. 573; Clyde v. Hubbard, 83 Penn. St. 358; McCluer v. Manchester R., 13 Gray, 124. An enabling statute may be found in some States in aid of this right. Burtis v. Buffalo R., 24 N. Y. 269. And see McCluer v. Manchester R., 13 Gray, 124. The former disposition in Connecticut was to deny this right to a chartered railway; but the later cases do not appear to justify this narrow policy. Converse v. Norwich Trans. Co., 33 Conn. 166, commenting upon Hood v. New York & New Haven R., 22 Conn. 1.

In Burtis v. Buffalo R., 24 N. Y. 269, the principle of the text is admitted to apply to connecting roads extending beyond the limits of the State. And such, agreeably to the necessities of traffic, is the general rule of our States. Lindley v. Richmond R., 88 N. C. 547; Railroad Co. v. Pratt, 22 Wall. 123; McCluer v. Manchester R., 13 Gray, 124.

Legislation sometimes aids, or rather declares, the same doctrine. 45 N. Y. 524.

§ 594. **Principles of Liability for Loss stated.** — The cases, English and American, appear fairly in accord upon the general principles of liability for loss, as applied to connecting carriers. 1. If the connecting carriers undertake the transportation of goods for a customer in the close relation of a mutual agency with joint principals or a partnership, the receiving company or general agent makes a contract which binds all jointly and severally, for any loss or injury which may occur on the route; and in case of loss or injury, the customer may sue accordingly.¹

2. If the receiving carrier agrees to carry the goods through to their destination, and beyond his own route, this carrier is to be treated by the customer like a principal who employs his own agents; hence, for a loss or injury thus occurring the customer should sue him; such carrier being assumed to have his own remedy over against the delinquent carrier, and to undertake towards the public to transport in the capacity of common carrier for the entire distance.²

3. But where the receiving carrier, either for himself alone, or as the mere agent of other principals connected with him in the carriage, undertakes the transportation, he is liable only for his own route as common carrier, and for safe storage and due delivery to the next carrier in turn; in other words, he is a mere forwarder, except for his own portion of the journey.³

§ 595. **Confusion of Authority relates to Proof and Presumption concerning the Actual Engagement.** — There is, however,

¹ See Blackburn, J., in *Gill v. Manchester R.*, L. R. 8 Q. B. 186; *Pratt v. Ogdensburg R.*, 102 Mass. 557; *Barter v. Wheeler*, 49 N. H. 9; *Railroad Co. v. Pratt*, 22 Wall. 123; *supra*, § 592.

² *Southwestern R. v. Thornton*, 71 Ga. 61. We shall presently see that this contract is more readily inferred in England than America. *Post*, §§ 596-600, and cases cited.

³ *Insurance Co. v. Railroad Co.*, 14 Otto, 146; *post*, § 597; *Darling v. Boston & Worcester R.*, 11 Allen, 295; *Sherman v. Hudson River R.*, 64 N. Y. 254; *Brintnall v. Saratoga R.*, 32 Vt. 665.

much confusion and discordance to be found in the decisions under connecting carriers, for the reason that proof and presumptions are applied differently to determine which, in a given case, was the carrier's actual engagement to his customer; whether, in point of fact, there was a partnership or mutual agency, or an undertaking to be a through carrier, or simply a forwarder beyond one's own route. For, plainly enough, a carrier may by special contract with his customer overcome the presumption that his undertaking was upon one footing rather than another, and may modify considerably the usual liabilities of any such capacity. The proof which overcomes the usual presumption, and establishes a special contract relation, may be oral or written, direct or circumstantial. But what proof shall suffice, and what shall be the usual presumption in the absence of countervailing proof, we must now inquire.

§ 596. **English Presumption favors the Idea of a Through Undertaking.**— Upon the issue of presumptions and proof thus presented, English and American authorities have long been at variance. In England, whose railroad system is snug and compact, inheriting to a remarkable degree the traditions of stage-coach conveyance, the disposition has been, from the first, to regard the company which receives a parcel and books it for a certain destination as a carrier, by implication, for the whole distance.¹ This, in a leading case, decided not long after the introduction of steam inland locomotion, was pronounced the rule, notwithstanding payment in advance for the carriage had been declined by the booking company, whose route was well known to extend only part way to the final destination, and the loss of the goods occurred at a point beyond, which was traversed by a connecting railway. For, as the court observed, the carrier, by receiving the parcel to carry, whether beyond or within the limits of his own route,

¹ *Muschamp v. Lancaster R.*, 8 M. & W. 421; *Coxon v. Great Western R.*, 5 H. & N. 274; *Bristol & Exeter R. v. Collins*, 7 H. L. 194.

and not positively limiting his responsibility, undertook, *prima facie*, to carry the parcel to its destination.¹ And the House of Lords has gone so far in this direction as to insist, in a stubbornly contested case carried up on final appeal, that where the contract for carriage is made thus exclusively with the first company, the owner cannot sue any of the subsequent companies on the route for their miscarriage.²

Here we discover, then, a strong disposition to favor our second principle of liability where the carriage of goods is undertaken over connecting routes; so that the receiving carrier appears in England the party actually bound to see that freight accepted for a certain point is duly delivered at the place of destination.

§ 597. **American Presumption favors Idea of a Forwarder's Undertaking.** — In America, on the other hand, where railways transcend State limits, and bring distant cities into closer communion by cutting paths through intermediate forests and over prairies, where it must often be an inconvenience to sue the first carrier alone, and where, in fact, this sort of extended transportation is novel and *sui generis*, the more obvious disposition has been to regard each of several successive companies, where no special undertaking appears to the contrary, as liable in the common-carrier capacity only for the space of its own route, and intending beyond this no more than safe storage, and due delivery to the next carrier in succession.³

¹ *Muschamp v. Lancaster R.*, 8 M. & W. 421.

² *Bristol & Exeter R. v. Collins*, 7 H. L. 194, on appeal, reversing *Collins v. Bristol & Exeter R.*, 1 H. & N. 517; which reversed s. c. 11 Ex. 790; *Mylton v. Midland R.*, 4 H. & N. 615; 5 H. & N. 274. Cf. *Gill v. Manchester R.*, L. R. 8 Q. B. 156.

The English rule then is that, where a railway or other carrier receives goods, marked or otherwise directed to a place beyond the carrier's own line, this affords *prima facie* evidence of a contract to carry the goods through, notwithstanding payment of through freight was not accepted by such carrier, nor proof afforded that he had any business connection with the parties beyond his own line.

³ *Van Santvoord v. St. John*, 6 Hill, 157, *Converse v. Norwich Trans.*

More particularly does the railway which receives the goods marked to some point beyond its own line find immunity against the subsequent miscarriage of a connecting company where nothing like a partnership or agency relation is shown to exist between the two, and the first railway neither took pay for carriage of the goods beyond its own terminus, nor agreed to send them through on its own responsibility.¹ The simple receipt of goods so marked will not, then, *prima facie* import a promise to carry them to their final destination, according to our leading State authorities.²

This doctrine, we may add, has received the approval of the Supreme Court of the United States in repeated instances.³ The preponderance of authority in this country favors, therefore, the presumption that each carrier in a continuous transportation is only a forwarder beyond his own line; that the receiving carrier is no more than the agent of others succeeding him in the carriage.⁴

Co., 33 Conn. 166; *Nutting v. Conn. River R.*, 1 Gray, 502; *Farmers' Bank v. Champlain Trans. Co.*, 18 Vt. 131; 23 Vt. 186; *Railroad Co. v. Berry*, 68 Penn. St. 272; 88 N. C. 547; 19 S. C. 353; 43 Mich. 609; *Knight v. Providence R.*, 13 R. I. 572; 19 Ohio St. 221; *Rawson v. Holland*, 59 N. Y. 611; *McMillan v. Michigan Southern R.*, 16 Mich. 80; *Schneider v. Evans*, 25 Wis. 241; *Merrick v. Gordon*, 20 N. Y. 93; *Montgomery, &c. R. v. Moore*, 51 Ala. 394; *Sherman v. Hudson River R.*, 64 N. Y. 254; *Perkins v. Portland R.*, 47 Me. 573; *Brintnall v. Saratoga, &c. R.*, 32 Vt. 665; *Crawford v. Southern R.*, 51 Miss. 222; *Lawrence v. Winona R.*, 15 Minn. 390.

¹ *Nutting v. Conn. River R.*, 1 Gray, 502; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Lowell Wire Fence Co. v. Sargent*, 8 Allen, 189.

² See *Burroughs v. Norwich & Worcester R.*, 100 Mass. 26; *Lock Co. v. Railroad*, 48 N. H. 339, and authorities cited; 51 N. H. 9.

³ *Insurance Co. v. Railroad Co.*, 14 Otto, 146; *Railroad Co. v. Man. Co.*, 16 Wall. 318; *Railroad Co. v. Pratt*, 22 Wall. 123.

⁴ In such cases it is the duty of the carrier, in the absence of any special contract [express or implied] to carry safely to the end of his line and to deliver to the next carrier in the route beyond." Mr. Justice Davis, in *Railroad Co. v. Man. Co.*, *supra*.

⁴ In other words, our third principle of liability is the favored one in the United States. See *supra*, § 594.

§ 598. **The same Subject; Exceptions stated.**—There are, however, American decisions in the highest courts of some States, which harmonize more closely with the English doctrine in this respect,¹ and regard the mere receipt of goods destined beyond one's own route as tantamount to a through undertaking for common carriage in the absence of an express disclaimer by the receiving carrier. And, it should be observed, our present contention is for a *prima facie* case only; which, by the showing of attendant circumstances, or usage, might be so readily overcome, in a particular case, that doubtless some explicit disavowal of responsibility beyond one's own route, in the contract of transportation, is always prudent wherever one carrier receives goods, to be sent by connecting lines beyond his own terminus, each carrier of whom is to transport on his separate risk.²

Under English or American presumptions, that most onerous principle of partnership, or joint and several liability in a connecting carriage, the first above stated, finds the most disfavor, and requires the strictest proof.

§ 599. **American Rule favors suing the Carrier who occasioned the Loss.**—We may add that while English courts have pronounced the receiving carrier exclusively liable for a loss over the whole route,³ no such rigid adherence to legal con-

¹ *Kyle v. Laurens R.*, 10 Rich. 382; *Illinois Central R. v. Copeland*, 24 Ill. 332; *Rome R. v. Sullivan*, 25 Ga. 228; 74 Ill. 197; *Mulligan v. Illinois Central R.*, 36 Iowa, 181; *East Tennessee R. v. Rogers*, 6 Heisk. 143; *Mobile R. v. Copeland*, 63 Ala. 219; 38 Ga. 37; *Halliday v. St. Louis R.*, 74 Mo. 159.

² “It is unfortunate for the interests of commerce that there is any diversity of opinion on such a subject, especially in this country; but the rule that holds the carrier only liable to the extent of his own route, and for the safe storage and delivery to the next carrier, is in itself so just and reasonable that we do not hesitate to give it our sanction.” Mr. Justice Davis, in *Railroad Co. v. Man. Co.*, 16 Wall. 318.

³ *Supra*, § 596. But this is probably because one may more conveniently rely upon the receiving carrier exclusively in that country, where inland carriage is within a small and compact jurisdiction, than in the

sistency is favored in this country. On the contrary, the carrier company which in point of fact can be shown to have occasioned the loss or injury is suable by the customer, as American courts have ruled, even though the first carrier may by his sufficient and express contract have assumed the transportation risks for the entire distance. And just as an innocent and non-contracting carrier is, on the one hand, shielded if possible, so, on the other, is the disposition strong to hold a connecting carrier answerable for his own negligence.¹

§ 600. **Special Contract to carry through, how shown.** — By special contract, unquestionably, a carrier may, in America, as well as in England, assume to transport beyond his own limits;² and such a contract, it is generally admitted, is inferable from circumstances independently of an express stipulation.³ Thus, it may be established by the terms of a through way-bill, or the charge of a specific price for transportation over the whole route.⁴ Any written document given duly to the consignor by way of receipt, and as an

United States; for, where railways amalgamate, or a joint or partnership arrangement between carriers is shown clearly to exist, or the receiving company may be pronounced an authorized agent contracting on behalf of itself and another as principal connecting carriers to carry goods through, the owner of goods is not, in Great Britain, debarred from pursuing the carrier company which occasioned the loss. *Gill v. Manchester R.*, L. R. 8 Q. B. 156.

¹ See *Aigen v. Boston & Maine R.*, 132 Mass. 423, *per curiam*; *Packard v. Taylor*, 35 Ark. 402.

"I have not met with an American case in which the rule has been pressed to the extent of holding that the owner cannot come on any carrier by whose default the loss or damage actually happened." *Perley, C. J.*, in *Lock Co. v. Railroad*, 48 N. H. 339.

² *Supra*, § 593, and cases cited.

³ See *Crawford v. Southern R.*, 51 Miss. 222; *Cutts v. Brainerd*, 42 Vt. 466; *Najac v. Boston & Lowell R.*, 7 Allen, 329; *Lock Co. v. Railroad*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9, 24.

⁴ *Railroad Co. v. Pratt*, 22 Wall. 123; *Cincinnati R. v. Spratt*, 2 Duv. 4, 8, *per Robertson, J.*; *Evansville R. v. Marsh*, 57 Ind. 505.

expression of the carriage terms, bears upon this question; the force and meaning of such documents come frequently before the court for construction; and writings furnish not only evidence, but the best evidence, of what the contract really was. But material surrounding circumstances should be submitted as part of the case to a jury; and where there is competent evidence on which such jury may lawfully find the existence of the through contract alleged, the court ought not to determine the issue by its own arbitrary construction of particular writings.¹

Usage and the general business course of the receiving carrier may be shown as tending to establish on his part the assumption of a through liability.²

§ 601. **The same Subject.**—The acts and admissions of such corporate agents and officers as usually attend to freight may fairly bind the company in all undertakings of

¹ *Myrick v. Michigan Central R.*, 107 U. S. 102; 14 Wall. 484; *Railroad Co. v. Pratt*, 22 Wall. 123.

Receipt of the entire pay, by the receiving carrier, affords a fair presumption of an entire contract. *Railroad Co. v. Pratt*, 22 Wall. 123. Receiving part of the shipment on the connecting road for the customer's own convenience is an incidental circumstance, and does not affect the through contract. *Railroad Co. v. Pratt*, 22 Wall. 123.

In construing documents of carriage, the whole language and tenor of the instrument should be fairly considered. Such words as "transport" or "carry" (which are equivalent) are distinct from the idea of "forwarding." 22 Wall. 123. And see *Myrick v. Michigan Central R.*, 107 U. S. 102; *Ortt v. Minneapolis R. (Minn.)*, 31 N. W. 519; *Harris v. Grand Trunk R. (R. I.)*, 5 Atl. 305. *East Tennessee R. v. Rogers*, 6 Heisk. 143, goes so far as to assert that any contract to "forward" goods to a certain point beyond one's route signifies to transport them with the risks of common carrier; relying upon *Cutts v. Brainerd*, 42 Vt. 466, where, however, the proof of such intention was more specific, and the words used were to "forward and deliver." That a carrier who stipulates for through liability becomes liable for misdelivery by the connecting carrier to whom he has delivered the goods, see *Clyde v. Hubbard*, 88 Penn. St. 358.

Liability for carriage over a connecting route is not to be inferred, but must be proved by satisfactory evidence. 24 Fed. R. 509.

² *Lowenburg v. Jones*, 56 Miss. 688.

this character.¹ And it is adjudged that a company which has held itself out in such a manner, and for so long a time, as a common carrier to a place beyond its own terminus, that the corporators may be presumed to have knowingly assented thereto, is estopped to deny the validity of a through contract for carriage entered into by its usual agent; whether on the ground that the charter does not expressly give the company power to make such a contract, or that the agent was not duly empowered.² So a depot agent who receives and forwards freight can, in the absence of special instructions made known to the public, bind his company to send through merchandise;³ yet a cautious shipper will scrutinize such agent's authority, unless it can be reasonably inferred from previous dealings, or the company has held itself out for business to such points.⁴

While a company may thus render itself responsible to the customer beyond its limits, it cannot, of course, bind companies owning the connecting roads, without in some manner procuring their consent or acquiescence thereto.⁵

§ 602. **The same Subject; Effect of a Through Receipt in Connection with other Circumstances.**—The New Hampshire rule, founded upon an exhaustive review of the cases, appears to be that while the mere acceptance of goods marked beyond one's terminus should import by itself no absolute undertaking to be responsible for the whole journey, this is a circumstance which, with the other facts in a given case, may be

¹ See *Noyes v. Rutland R.*, 27 Vt. 110; 2 Redfield Railways, § 163.

² *Perkins v. Portland, &c. R.*, 47 Me. 573; *supra*, § 593.

³ *Watson v. Memphis R.*, 9 Heisk. 255.

⁴ *Grover Sewing Machine Co. v. Missouri Pacific R.*, 70 Mo. 672, requires express proof of authority, in order to make such an agent's contract binding, unless this reasonable inference can be made.

⁵ See *Bank of Kentucky v. Adams Express Co.*, 93 U. S. 174; *Chicago &c. R. v. Northern Line Packet Co.*, 70 Ill. 217; *Newell v. Smith*, 49 Vt. 255.

As to a railroad agent's verbal agreement that goods shall be sent farther than the bill of lading specifies, see 34 Hun, 97.

weighed by the jury ;¹ which, in a measure supported by many of the other decisions, should perhaps be pronounced the most rational doctrine of the three we have stated, though not the most exact of application.

The carrier's receipt of goods directed beyond his own route may charge him accordingly, even in States which deny the presumption favored by the English courts, when other circumstances concur to fasten upon him the intent of sending the goods through on his sole undertaking with the owner. Receiving with the goods thus directed freight-money in advance for the whole distance should strongly manifest such an intent;² and the transportation methods of the connecting roads, the manner in which their through business is held out to the public, to one another, and to the particular customer, bear forcibly upon the issue thus presented, of the receiving carrier's liability for goods beyond his own line, according as the bailment must justly have contemplated; which issue circumstances, as well as positive stipulation, may in good reason resolve.³

¹ See the very learned opinion of Perley, C. J., in *Lock Co. v. Railroad*, 48 N. H. 339; *Gray v. Jackson*, 51 N. H. 9, 24.

² *Illinois Central R. v. Copeland*, 24 Ill. 332; *Weed v. Saratoga R.*, 19 Wend. 534; *Adams Express Co. v. Wilson*, 81 Ill. 143; *Baltimore Steamboat Co. v. Brown*, 54 Penn. St. 77. Even in the leading case of *Muschamp v. Lancaster R.*, 8 M. & W. 421, the consignee's offer in advance of freight-money to the terminus was not declined by the carrier in any such manner as denied his right to be paid for the continuous transportation.

³ *Hill Manuf. Co. v. Boston & Lowell R.*, 104 Mass. 122; *Champion v. Bostwick*, 18 Wend. 176; *Fitchburg & Worcester R. v. Hanna*, 6 Gray, 539; *Morse v. Brainerd*, 41 Vt. 550. But see *Converse v. Norwich Trans. Co.*, 33 Conn. 166, citing previous decisions of that State; *Burroughs v. Norwich & Worcester R.*, 100 Mass. 26, and cases cited. And see *supra*, § 600.

Allowing, therefore, for the differences of presumption and circumstantial proof, the rule of a connecting carrier's liability appears to be according to the fundamental rules already stated, *supra*, § 594. To these the reader's attention is once more directed.

§ 603. **Special Contract may exclude a Through Liability.**— On the other hand, since it is no part of a common carrier's obligation to carry goods on his own risk beyond his terminus, so may he, by special agreement, lawfully stipulate, on receiving property for a distant destination, that he shall not be liable as common carrier beyond his own route,—a most convenient means, doubtless, of countervailing these troublesome presumptions, and making the limits of one's own undertaking specific.¹ And railways and steamships not uncommonly, in these days, issue their tickets, way-bills, receipts, or other documents for transportation over continuous lines, so expressed as clearly to indicate whether the receiving carrier engages to send the goods through, and thus hold himself responsible as carrier for the entire distance, with a duty of final delivery at the point of destination, or so that each successive carrier shall be responsible only for losses occurring on his own route, and before compliance with the duty of delivering to the next carrier in order.² And thus by special contract or reservation does the receiving carrier fortify the usual presumptions in his favor, where the presumption is that of an undertaking as forwarder beyond his own route, since independent connecting carriers may provide for a distinct and independent responsibility, each for his own line.

§ 604. **Contracts of Connecting Carriers in General.**— To speak generally, the stipulations of connecting carriers, by way of specially modifying the usual risks or bailment performance, take effect upon the usual conditions applicable

¹ *Fowles v. Great Western R.*, 7 Ex. 699; *Shiff v. New York Central R.*, 23 N. Y. Supr. 278; *Mulligan v. Illinois Central R.*, 36 Ill. 181; *United States Express Co. v. Haines*, 67 Ill. 127; *Detroit, &c. R. v. Farmers', &c. Bank*, 20 Wis. 122; *Berg v. Atchison R.*, 30 Kan. 561; 7 Daly, 456; 89 N. C. 311.

² *Ib.* See *Erie v. Lockwood*, 28 Ohio St. 358.

No carrier can be compelled to give a bill of lading making him responsible for goods beyond his own route. 73 Ala. 306.

to common carriers who seek to modify their legal duties in corresponding respects. Thus, the stipulation itself must conform to public policy;¹ and it must be suitably and reasonably brought to the customer's knowledge;² while, as we have seen, a bill of lading binds by its express terms, although the shipper fails to read the document.³

Where the freight contract is for through transportation, but not otherwise, each connecting carrier, as a rule, will be entitled to the benefits and exemptions of the contract made by the shipper and the first carrier.⁴ Thus, an exemption made by one carrier on behalf of himself and the connecting carriers for loss by "accidental fire" is available to each and all carriers concerned, wherever the fire may have occurred.⁵ But one receiving goods as a connecting carrier cannot, as such, claim the benefit of an express limitation of risks for which the first carrier stipulated with the consignor on his own behalf and for his own protection only.⁶ For one of

¹ See c. 5.

The special stipulation for a continuous carriage that the company in whose possession the goods are at the time of loss or damage shall alone be liable, is reasonable and valid. 89 N. C. 311; § 603.

But though a carrier should stipulate against responsibility for damage beyond his own line, his failure, without sufficient excuse, to send by the line or route or in the cars promised, renders him still liable for damage or delay: for this is a deviation from the terms of the bailment. *Galveston R. v. Allison*, 59 Tex. 193; *Levy v. Louisville R.*, 35 La. Ann. 615; *Georgia R. v. Cole*, 68 Ga. 623. If a carrier contracts to send through by a certain line by a given time, he is liable for losses caused by delays over a connecting road. 66 Cal. 92.

² See, as to a special notice printed on the back of a receipt, which was deemed insufficient to bind the shipper, *Railroad Co. v. Man. Co.*, 16 Wall. 318.

³ *Phifer v. Carolina R.*, 89 N. C. 311.

⁴ See *Scott, C. J.*, in *Merchants' Despatch Co. v. Bolles*, 80 Ill. 473.

⁵ *Whitworth v. Erie R.*, 87 N. Y. 413. In *Railroad Co. v. Androscoggin Mills*, 22 Wall. 594, the bill of lading was given by a railroad company on behalf of itself and preceding and subsequent carriers on the route.

⁶ *Bancroft v. Merchants' Desp. Trans. Co.*, 47 Iowa, 262; *Taylor v. Little Rock R.*, 39 Ark. 168.

several connecting carriers may limit the risks of transportation while the goods are in his own custody alone.¹

§ 605. **Intermediate Carrier not in Default is not Liable.** — An intermediate carrier in a continuous line, who has made no contract with the customer and is not in actual default, cannot be held liable to consignor or consignee, for the negligence, extortion, or misconduct of other carriers, whatever may be his liability to the contracting carrier.²

§ 606. **Presumption in Case of Loss or Injury.** — The fair presumption, in case of a loss or injury discovered when arrival was due over connecting roads, is that the loss occurred through the fault of the last carrier. Were this otherwise, the owner of property who is compelled to sue the company occasioning the loss could seldom establish his case in proof.³ Thus, it is held that, where three successive carriers ship cloth in a box, and, upon delivery at the point of destination, and examination by the consignee, the box is found to have been opened, a number of pieces abstracted, and the cover fastened down again, a jury may presume, in absence of evidence to the contrary, that the box remained unopened until it came into the last carrier's possession.⁴

¹ 55 Mich. 218.

² *Hill v. Burlington R.*, 60 Iowa, 196. Unless, perhaps, some partnership or mutual agency relation can be shown to charge him more closely. *Supra*, §§ 590-592.

³ *Laughlin v. Chicago R.*, 28 Wis. 204; *Memphis R. v. Holloway*, 9 Baxt. 188; *Leo v. St. Paul R.*, 30 Minn. 438.

⁴ *Ib.* And see *supra*, § 439; *Brintnall v. Saratoga R.*, 32 Vt. 665; *Smith v. New York Central R.*, 43 Barb. 225, affirmed on appeal, but not reported, 41 N. Y. 620 (index); *Southern Express Co. v. Hess*, 53 Ala. 19. The court sensibly observes by Dixon, C. J., in *Laughlin v. Chicago R.*, *supra*, 209, while admitting the poverty of precedents on this point: "If there were no redress in such case, it would no longer be the boast of our law that there is no wrong without its remedy, and the strict liability of common carriers, whenever two or more are associated in the transportation or connected in the line or route, would be at an end. It would be far more in harmony with the rules of the common law respecting such liability, that any or all of the carriers so associated, or whose lines or routes connect,

This presumption, however, best avails under that American rule, elsewhere stated,¹ which protects the receiving carrier; thereby compelling the customer, under any other theory, to search far and wide through different States, it may be, for the company through whose delinquency the mischief was in fact occasioned. Under the English presumption so onerous a necessity is avoided by the rule which places the responsibility once and for all upon the receiving carrier;² and there are States which, pursuing that same rule (or possibly without doing so), deny to the customer any right to hold the last carrier liable, or any carrier later than the first; unless, at all events, he can allege and prove that such carrier was actually the delinquent one, or else can establish such community of interest in the transportation as to constitute a partnership or mutual agency of these companies towards the public.³

and who have had possession of the goods, should be held liable, at the option of the owner or consignee in such cases, than that none of them should be. . . . The difficulties, nay, even impossibilities, by which owners would be beset, if put to the task of ascertaining where their packages or boxes were broken open and contents plundered when in transit over our long routes, are well known, and are illustrated by the facts of this case."

See also as to lost baggage, *Savannah R. v. McIntosh*, 73 Ga. 532. That the customer must prove good condition when the goods were delivered to the first carrier is of course requisite. 1 Ill. App. 489; *supra*, c. 8. The last carrier may, if sued, show that the loss did not occur on his line. 9 Baxt. 188.

¹ *Supra*, § 597.

² *Supra*, § 596.

³ See *supra*, § 598; 21 S. C. 35; *Atchison R. v. Roach*, 35 Kan. 710; *Chicago R. v. Fahey*, 52 Ill. 81. In order to hold the last carrier liable, the plaintiff must prove that the goods were in a good condition when delivered to him. *Marquette R. v. Kirkwood*, 45 Mich. 51. The Michigan rule is admitted to differ from that of Wisconsin in this respect.

Some local statutes undertake to define which company in a connecting line of railways shall be held liable for a loss occurring on the transit. *Evans v. Atlanta R.*, 56 Ga. 498.

The company which is sued for loss may by the agent of a connecting road, with the aid of entries in the books of such road, prove delivery thereto in good order. 65 Ga. 39.

§ 607. **Liability of Connecting Carriers towards One Another.** — Where the receiving carrier or any other carrier who did not in fact cause the loss is made responsible to the customer for the loss or injury suffered, his remedy over against the connecting carrier or carriers depends mainly upon the private arrangement which exists between them. Usually some full and explicit contract will be found to determine this liability of carriers *inter sese*, whether by way of partnership or mutual agency or on the basis of a less intimate arrangement. On general principle, however, the first carrier or principal transporter who is held answerable to the public may in such a case sue, on his own behalf, the connecting carrier through whose delinquency or default a loss occurred, just as other principals may their own subordinates; but he cannot hold connecting carriers who are blameless thus answerable merely because of the connection.¹

§ 608. **Commencement of Connecting Carrier's Risk.** — Having discussed the main question of liability, it remains to notice a few other points of inquiry under the law of connecting carriers. And, first, as to when the risk of a connecting carrier commences. The fundamental doctrine of bailment delivery here applies; and we may state generally that this carrier's liability as such commences when the goods are delivered to him or his authorized agent for immediate transportation and accepted accordingly; or, to come closer to the point, that the succeeding carrier's risk attaches upon his receipt and acceptance of goods from his predecessor to transport the same without awaiting further orders. What favors the idea of an acceptance as for immediate transportation more especially in this instance is, that the consignor or owner unless notified is necessarily debarred from handling the goods for himself, but must leave the connecting carriers to

¹ Chicago R. v. Northern Line Packet Co., 70 Ill. 217; Smith v. Foran, 43 Conn. 244. See also Powhatan Co. v. Appomattox R., 24 How. 247. Cf. *supra*, §§ 590-592.

arrange the transfer of delivery with one another, trusting that some carrier's risk is attached throughout the journey without intermission.

Any mode of acceptance, even though it were a deposit without notice, to which the carrier who receives has agreed or bound himself, fixes his liability.¹ And it would appear, that the receiving carrier's lesser risk as warehouseman goes rather to the disadvantage of his predecessor than the shipper of the goods; since it would be unfair to permit the customer to be sacrificed between the continuous parties who are performing their public vocation together without his intervention. But what shall constitute for fixing liability as between these carriers a deposit with the new carrier for the purpose of transportation onward, without further orders, it is sometimes difficult upon the peculiar facts to decide. In Massachusetts it is held that where goods are delivered by one company to another to be forwarded, and the mutual practice is not to put them on a new transit until a bill of expenses incurred on the previous line is given, the new carrier is no more than a warehouseman while he waits for such document.² In New York the same point appears to have been decided the other way; though perhaps only by way of emphasizing the need of more than the receiving company's own regulations to justify its delay in this particular.³

Delivery by one of the connecting carriers, not for storage, however, but solely for transportation onward, there being nothing to wait for, will render the new carrier, whenever he accepts the goods, instantly liable to the full extent of his

¹ 24 Conn. 354; 33 ib. 166; *Pratt v. Railway Co.*, 90 U. S. 43.

² *Judson v. Western R.*, 4 Allen, 520. Here the companies transported in succession, but without a close connection of traffic. A railroad company receiving goods from a connecting road ought to transport forthwith; it has no right to detain on the ground that its own regulations require the receipt of a bill of back charges which has not been furnished. *Dunham v. Boston & Maine R.*, 70 Me. 164.

³ *Michaels v. New York R.*, 30 N. Y. 564.

public capacity;¹ and if the liability of the succeeding carrier attaches, the liability of his predecessor is discharged,² subject to the presumptions and special undertakings already set forth.

§ 609. **Termination of Connecting Carrier's Risk.** — If the later receiving carrier in a continuous transportation be not liable, then his predecessor should be. As to delivering sufficiently and discharging one's own carriage risk in such cases, the general rule adopted by the courts of this country makes it the duty of such a carrier, in the absence of any special contract to the contrary, to carry to the end of his line, and then deliver to the next carrier in the route beyond,³ agreeably to the presumption that he has undertaken as forwarder, to be so far responsible but not farther. And the opinion which best supports the common-law policy pronounces the carrier in such a case so far bound to deliver or attempt delivering to the connecting carrier, that he cannot discharge himself of his carriage responsibility by merely storing the goods in his depot at the end of his own route.⁴

¹ *Pratt v. Railway Co.*, 90 U. S. 43; *Cincinnati R. v. Spratt*, 2 Duv. 4; *Story Bailm.* § 536; *Converse v. Norwich Trans. Co.*, 33 Conn. 166; *Rogers v. Wheeler*, 52 N. Y. 262; 59 N. Y. 34, 611.

² *Pratt v. Railway Co.*, *supra*; *O'Neil v. N. Y. Central R.*, 60 N. Y. 138.

³ *Railroad Co. v. Manuf. Co.*, 16 Wall. 318; *Condon v. Marquette R.*, 55 Mich. 218; *McDonald v. Western R.*, 34 N. Y. 497; *Mills v. Michigan Central R.*, 45 N. Y. 622; *Conkey v. Milwaukee R.*, 31 Wis. 619, overruling *Wood v. Milwaukee R.*, 27 Wis. 541; *Rawson v. Holland*, 59 N. Y. 611; *Lawrence v. Winona R.*, 15 Minn. 390; *Merchants' Despatch Co. v. Bolles*, 80 Ill. 473. The doctrine of Massachusetts and other States, referred to *supra*, § 513, which permits railways to terminate the carriage liability by unloading and storing the goods (which States like New York strongly oppose), may be thought in conflict with the statement of the text. But it does not follow that the same doctrine applies to connecting carriers and a consignee. See Gray, C. J., in *Rice v. Hart*, 118 Mass. 201, 208. See, however, *Denny v. New York Central R.*, 13 Gray, 481, 487; *Judson v. Western R.*, 4 Allen, 520, 523.

⁴ As Mr. Justice Davis observes, with much prudence of expression,

But there are circumstances under which the intermediate carrier should be held liable as warehouseman only; as where he has given notice, and afforded the next carrier reasonable opportunity to take the goods away, and, on the latter's failure to do so, or refusal to accept, has stored and plainly renounced the relation of carrier towards them;¹ and, perhaps, too, in the case of a break in the line of transit, referable to act of God or a public enemy, which renders it impossible for the goods to be promptly forwarded; provided the carrier clearly manifests the intent to absolve himself and acts with becoming discretion.² Yet it is held that where a railway transports, whose successor in the line is a steam inland vessel, the reasonable time requisite to discharge the railway as carrier does not expire before the propeller has opportunity, in the ordinary course of business, to receive the freight;³ also, that a railway company does not discharge itself by placing the freight in that

in *Railroad Co. v. Manuf. Co.*, 16 Wall. 318, 325: "If there be a necessity for storage it will be considered a mere accessory to the transportation, and not as changing the nature of the bailment. It is very clear that the simple deposit of the goods by the carrier in his depot, unaccompanied by any act indicating an intention to renounce the obligation of a carrier, will not change or modify even his liability. It may be, that circumstances may arise after the goods have reached the depot which would justify the carrier in warehousing them, but if he had reasonable grounds to anticipate the occurrence of these adverse circumstances when he received the goods, he cannot, by storing them, change his relation towards them." And see *McDonald v. Western R.*, 34 N. Y. 497; *Bancroft v. Merchants' Despatch Co.*, 47 Iowa, 262. In 11 Blatchf. 9, a railway receipt was held no special contract modifying these terms.

Condon v. Marquette R., 55 Mich. 218, per Cooley, C. J., confirms strongly this doctrine, and holds the preceding carrier liable who has given no notice nor tendered to the next, even though, in pursuance of custom, he stores the goods in a warehouse of his own, from which the next carrier is in the habit of taking freight at his own convenience.

¹ *Goold v. Chapin*, 20 N. Y. 259; *McDonald v. Western R.*, 34 N. Y. 497.

² See *Dixon, C. J.*, in *Conkey v. Milwaukee R.*, 31 Wis. 619.

³ *Mills v. Michigan Central R.*, 45 N. Y. 622.

portion of its warehouse appropriated to goods for the connecting carrier, from which that carrier is wont, without notice or request, to take the goods once a day,¹ or at convenience.²

§ 610. **Compensation of Connecting Carriers; Back Freight or Charges.** — Each carrier in a connecting line is entitled to his own reasonable or stipulated recompense; besides which, a liberal standard of reimbursement avails as to back freight or charges upon the goods. Were carriers to transport in succession without any through arrangement, each might demand his pay in advance or else hold the goods by his lien at his own journey's end; and the owner, in consequence, would have to employ some one at each terminus to settle charges and put the goods on their course.³ Hence the present business usage, founded on general convenience and necessity, for each succeeding carrier to pay his predecessor's charges in turn, as the owner's agent, and perform his own transportation. In this capacity of agent the connecting carrier ought not to advance for plainly erroneous and extortionate back charges, nor make such charges himself.⁴ Nor should he pay the preceding carrier in reckless disregard of loss or injury which is brought to his notice. But as to any intermediate damage done the goods, it is sufficient that such a party acts in good faith and with the diligence to be expected of an ordinarily prudent man, were he present and acting for himself; and, receiving goods in apparent good order, as described in the previous bill of lading, or else using rea-

¹ *Conkey v. Milwaukee R.*, 31 Wis. 619.

² *Condon v. Marquette R.*, 55 Mich. 218. And see *Powhatan Co. v. Appomattox R.*, 24 How. 247, as to the remedy of one carrier against another under such circumstances.

³ One of several connecting carriers need not pay back charges unless he chooses, even though it is customary to do so. 22 Fed. R. 32, 404. Unless such refusal is based upon an unlawful discrimination. *Ib.*

⁴ *Travis v. Thompson*, 37 Barb. 236. Cf. *Vaughan v. Providence R.*, 13 R. I. 578.

sonable exertions to ascertain how they became damaged, he does not forfeit his lien and right of compensation for his charges and those of his predecessors which he has advanced, provided his own transportation were performed with due diligence and despatch.¹ As he is not obliged to open a package and test the nature, condition, or quality of its contents, but may trust to appearances, it happens not unfrequently that a connecting carrier is justified in paying preceding charges where he could not have recovered for his own.²

A guaranty of through rates is sometimes given by the receiving or contracting carrier, for his customer's convenience, and by way of indemnity against unusual, uncertain, or extortionate charges on the route.³

Where the first of several connecting railway companies, while stipulating against responsibility beyond his own line, makes a guaranty that the cost of transportation to a distant point beyond his own route shall not exceed a certain sum less than the usual aggregate of charges, and this without any knowledge or notice of the guaranty by any of the connecting roads, and without their authority to give it, each succeeding company after the first may charge and pay preceding charges at the usual rates; and the last carrier or the final warehouseman will have a lien on the goods for the total amount

¹ Knight *v.* Providence R., 13 R. I. 572; Bissel *v.* Price, 16 Ill. 408, 414; Monteith *v.* Kirkpatrick, 3 Blatchf. 279; Bowman *v.* Hilton, 11 Ohio, 333.

² Knight *v.* Providence R., *supra*. Where, through the error of some intermediate carrier, the goods are sent to a place off the route, and the owner requests another carrier to bring them thence to their destination, this latter carrier acquires a lien for his own freight and the back charges which he has to pay before he can get the goods. Vaughan *v.* Providence R., 13 R. I. 578. *Seemle*, that unless this carrier had been directed to dispute the overcharges for missending the goods, he might pay without asking for instructions on that point.

³ Vaughan *v.* Providence R., 13 R. I. 578; Tardos *v.* Chicago R., 35 La. Ann. 15.

accordingly ; for the shipper's remedy in such case must be against the first carrier on the guaranty.¹

§ 611. **Notice of Default, etc., in a Continuous Transportation.** — Where a connecting carrier defaults or refuses compliance with the contracting carrier's engagement, notice is proper, and often imperative, for the due protection of others concerned. Thus, if a connecting carrier to whom the goods are consigned refuses to receive them, the preceding carrier should promptly notify his own bailor and predecessor, and the receiving and contracting carrier should with reasonable despatch notify his customer.² And a carrier whose contract expressly limits his responsibility to safe carriage over his own road and delivery to the connecting carrier, and to a guaranty of the through rate, is entitled to notice if the later carrier refuses to recognize such rate.³

Notice by the customer of some prior extortion or default charges the carrier who conducts himself afterwards in disregard thereof. Thus, if a consignee notifies the carrier that a lot of goods which is being sent by instalments is damaged and orders him to transport no more, the carrier should cease receiving and paying back freights upon such property.⁴

¹ *Schneider v. Evans*, 25 Wis. 241. Whether, if the other carriers had known of such guaranty, the legal result would have been different, *quære*. See also *Wells v. Thomas*, 27 Mo. 17; cases *supra*.

The value of an article lost by a prior carrier cannot be recouped in a suit by the last carrier against the consignee. *Lowenburg v. Jones*, 56 Miss. 688.

² 10 Mo. App. 134. Notice to the first carrier that the connecting line, owing to a blockade of freight, cannot receive and transport the goods, will not relieve the first from liability for damages caused by the delay, if he fails to notify the shipper. *Petersen v. Case*, 21 Fed. R. 885.

³ In the absence of such notice, no damages can be demanded beyond the difference between the rate agreed upon and the rate demanded; his guaranty being strictly construed. *Tardos v. Chicago R.*, 35 La. Ann. 15.

⁴ *Knight v. Providence R.*, 13 R. I. 572.

So, too, *semble*, if notice comes that the receiving carrier had consented to terms of carriage with the shipper unauthorized and inadmissible,

And a carrier who receives goods from another carrier, knowing that a through contract has been made and the price of transportation paid in advance, can assert no lien on the goods for transporting over his own line.¹

the succeeding carrier should refuse to receive on such terms, rather than transport silently and then claim to hold the goods for recompense on his own terms.

¹ Marsh v. Union Pacific R., 3 McCr. 250.

PART VII.

CARRIERS OF PASSENGERS.

CHAPTER I.

MATTERS PRELIMINARY TO THE JOURNEY.

§ 612. **Carriage of Passengers no Bailment, but a Corresponding Relation.** — It is not to be pretended at this day that, directly considered, the carriage of passengers, or, indeed, of human beings, is in the legal sense what the law denominates a bailment; though formerly the principle of distinction appears not to have been clearly apprehended.¹ But indirectly, and with incidental reference to the passenger's baggage, there is unquestionably a bailment; and a bailment subject, as we shall sufficiently show, to the general law of common carriers, and the assumption of an extraordinary risk on the part of the public transporter.² It is only in an age comparatively modern that the public transportation of persons from place to place, on hire, has in England and America called for the intervention of courts and the unfolding of legal principles;³ but the conveniences afforded on a large scale, first by mail coaches, and next by steam railways, for inland transit, besides those means of safe, speedy, and comfortable water transit by packet, vessel, and steamship, which, in the new era of invention, so steadily improve, have elevated the juris-

¹ *Supra*, §§ 331, 341.

² See c. 4, *post*.

³ *White v. Boulton, Peake*, 81, tried in 1791, before Lord Kenyon, appears to be the first recorded case at our law, where a person sued to recover damages done him as a passenger. And see *Angell Carriers*, § 521.

prudence of passenger carriage to an importance which it could never attain so long as the business itself was associated with humble ferrymen and watermen, or with the wagoner who gave the foot-traveller an occasional lift while pursuing, on his own behalf, a more profitable vocation.

Inasmuch as the carriage of passengers has now become, not only a highly important and lucrative vocation, but one, moreover, which engages to a very great extent the same organizations, the same aggregate of capital, and the same means of locomotion, as are employed in the carriage of freight, the present pursuit is very closely allied to that which we have just treated at length. And while, indirectly, the carrier of passengers is in our law a common carrier and a bailee, he is directly entitled to consideration in any work on bailments, because in so many respects the service of carrying human beings closely corresponds to that of carrying goods and chattels, in legal principle; and the decisions furnish legal analogies of much advantage to the student of bailment law, while in the points of unlikeness the very contrast is impressive.

§ 613. **Topics for Preliminary Discussion in this Chapter.**—Matters preliminary to the journey may separately be discussed under the following heads: 1. Who are Carriers of Passengers. 2. Who are Passengers. 3. Obligation to receive for carriage. 4. Passage tickets and fares. 5. Right of action against the carrier for his inexcusable refusal or failure to receive. 6. Legislation concerning fares and the carrier's obligation to receive.

§ 614. **Who are Carriers of Passengers.**—1. Let us consider who are Carriers of Passengers. This relation, like that of freight-carrier, may be either public or private, though the law deals chiefly with the former class; applying to its members the general style of carriers of passengers. The carrier of passengers, that is, the public carrier, may be (1) a carrier by land, or (2) a carrier by water; but the practical differ-

ence between these two classes, in respect of the carrier's rights and obligations, is rather one of detail than principle; and this difference we shall take occasion to notice as we proceed.¹

The proprietors of stage-coaches, hacks, passenger wagons, cabs, and omnibuses, who hold themselves out to the public for the general conveyance, under their own drivers, of persons from place to place, are familiar instances of public carriers of passengers by land. To this class belong also railway companies, the most extensive carriers of passengers, as well as of freight, known to modern times; and these sometimes perform their vocation as horse-railways, though most commonly propelled by steam, the means of locomotion entering as an essential element into the character of the public vocation itself.² Among the recognized public carriers of passengers by water are ships and vessels, particularly packet ships, steamships, steamboats, ferries, and, to some extent, the humbler boatmen or bargemen; and this, as the case may be, whether the propelling means offered be steam, as used for side-wheel craft and what are called propellers, or sails, or, for short distances, oars and human exertion.³ It is obvious, from this list, that the public carrier of passengers, whether by land or sea, is not necessarily a carrier of passengers only, apart from freight, nor of passengers having baggage.

¹ *Supra*, §§ 331, 332. And see, as to hackmen, *Lemon v. Chanslor*, 68 Mo. 340.

² *Supra*, §§ 351-353. And see, as to street railways, *Holly v. Atlanta Street R.*, 7 Rep. 460. Street-railways (1887) are beginning to use cable or electric power in some cities.

While a sleeping-car company is not strictly liable on the footing of innkeeper or common carrier, a passenger may generally assume a sleeping-car to be under the management of the company running the train and recover for injuries accordingly. *Penn. Co. v. Roy*, 102 U. S. 451; *Cleveland R. v. Walrath*, 38 Ohio St. 461; *Thorpe v. N. Y. Central R.*, 76 N. Y. 402.

³ *Supra*, §§ 354, 355.

§ 615. **The Responsible Transporter considered; Connecting Carriers, etc.** — But, in general, the rules discussed elsewhere as to what parties shall be deemed the responsible public transporters engaged in a public vocation apply here also,¹ though under certain qualifications which we now proceed to point out.

Where through-passage tickets are sold over the routes of connecting carriers, the principles which we discussed with reference to the carriage of goods come into operation. Doubtless the carrier company which sells the ticket may by contract, express or implied, bind itself to be responsible for the entire route. But, as the better authorities appear to view the rule, the sale of the through ticket, and receipt of the through-passage fare, is not conclusive on this point, and less so, indeed, as concerns the person of a passenger than his baggage or general freight; and the assumption of a partnership or mutual agency as to the passenger's own safe carriage, free from personal injury, or that the selling carrier sets himself forth as a principal, employing agents for that purpose, is less admissible, with respect to the passenger's personal carriage, than the theory that the carrier selling the ticket acts, in this respect only, as the agent of connecting carriers.² The special undertaking on this point should be gathered in any case from the circumstances; and the safer course, in selling through tickets, is to have them printed so

¹ *Supra*, §§ 356-365.

² 2 Redfield Railways, § 201, and cases cited; *Blake v. Great Western R.*, 7 H. & N. 987; *Knight v. Portland R.*, 56 Me. 234; *Nashville R. v. Sprayberry*, 9 Heisk. 852; *Sprague v. Smith*, 29 Vt. 421; *Ellsworth v. Tartt*, 26 Ala. 733. And see the recent English case of *Foulkes v. Metropolitan R.*, 4 C. P. D. 267, and authorities cited *passim*; 5 C. P. D. 157; cases *infra*. *Hartan v. Eastern R.*, 114 Mass. 44, affirms the theory of the text in a case where a sort of partnership arrangement between railway companies appeared as to the proceeds of sales of passenger tickets, and refused to hold the selling company liable for injury to the passenger on a connecting road, notwithstanding a ticket was sold through, with coupons invalid if detached. And see 35 Hun, 29.

as to show clearly whether or not the first carrier intends that each carrier shall be liable, as to the passenger's safety, for his own route alone.¹

§ 616. **The same Subject.** — Upon this important point there are not, as yet, very clear or harmonious conclusions reached by the decisions. We shall elsewhere see that the liability of the carrier who sells the through ticket over connecting lines is not unwillingly conceded in the instance of lost baggage, which follows closely the principle applied to the undertaking for transporting general freight.² Where, again, the selling company is sued in damages simply as for breach of contract, — because of a failure, for instance, to have the passenger transported with his baggage to the place of destination for the recompense agreed upon, or for so transporting without the promised means or facilities, that the passenger was unreasonably delayed, — the liability is likewise admitted.³ And

¹ See *supra*, Part VI. c. 9; *Burke v. South Eastern R.*, 5 C. P. D. 1. But such expressions are not always found serviceable. *Railroad Co. v. Harris*, 12 Wall. 65 (where, however, there was a unity of ownership, despite the expression of the ticket coupons).

A railroad company issuing through tickets beyond its own line for through recompense cannot specially exempt itself from liability except for its own route, in any such sense as to relieve it from the contract obligation to send the passenger through. *Central R. v. Combs*, 70 Ga. 533. Nor is such contract duty to be varied by leases and agreements with connecting roads of which the passenger had no notice. *Little v. Dusenberry*, 46 N. J. L. 614. And see as to baggage, *Railroad Co. v. Campbell*, 36 Ohio St. 647; *post*, c. 4; *Atchison v. Roach* (Kan.), 12 Pac. R. 93.

On the other hand, the disposition must be to hold to its obligation as concerns the public a company of the connecting line whose permission has been given to the sale of through tickets over its road, and to regard the first company not merely as a principal employing its own agents, and alone suable by the purchaser of the ticket, but in effect the agent of the road which capriciously refuses to honor the ticket. *Penn. R. v. Connell*, 112 Ill. 295.

² *Post*, c. 4; *Illinois Central R. v. Copeland*, 24 Ill. 332; *supra*, Part VI. c. 9.

³ *Quimby v. Vanderbilt*, 17 N. Y. 306; *Williams v. Vanderbilt*, 28 N. Y. 217; *Van Buskirk v. Roberts*, 31 N. Y. 661; *Carter v. Peck*, 4 Sneed, 203; *Central R. v. Combs*, 70 Ga. 533.

if the defence set up is such as to seek to throw the blame upon a connecting carrier, irresponsible at law, and such a one as the passenger would not have been likely to trust, apart from the confidence which the first carrier's sale of a through ticket invited, this might go, perhaps, towards favoring a suit against the first carrier as partner or principal.¹ But, as to actions for injury to life or limb because of the negligence or misconduct of a connecting carrier and those in his employ, our law manifests reluctance to holding the carrier responsible whose connection with the injury consists only in selling the through ticket, and who neither caused the injury nor was conveying the passenger when the injury was sustained.²

In support of the preference which even the English cases appear to manifest for holding the connecting carrier liable who causes actual injury to the person of a passenger, instead of the carrier who has merely sold and received payment for the through ticket, unlike the case of baggage or general freight, two strong considerations concur: 1. That the circumstances of receiving a bodily injury render it quite natural to supply evidence establishing blame on the part of the carrier at that time performing the service. 2. That inflicting bodily injury may be fairly regarded as tortious, rather than a breach of contract; and, on a familiar principle, even the agents or servants of another are suable on their tortious acts, as being outside the scope of a conferred authority.³

§ 617. **Responsible Transporter further considered; Connected Facilities, etc.**—Carriers of passengers may likewise have a close connection with reference to the use of the same depots, stations, or tracks. And here the inclination is to require each carrier to look after the safety and comfort of

¹ *Van Buskirk v. Roberts*, *supra*. And see *Railroad Co. v. Harris*, 12 Wall. 65.

² *Supra*, § 615, and cases cited.

³ See on this latter point, *Foulkes v. Metropolitan R.*, 4 C. P. D. 267, where this subject is well discussed; *Austin v. Great Western R.*, L. R. 2 Q. B. 442; *Great Western R. v. Blake*, 7 H. & N. 987.

his own passengers, consistently with his public undertaking to do so. Thus, in the case of railroad companies using a common passenger depot and common tracks of approach and departure, it is held that, though these should belong, in fact, to one of the companies alone, the depot and tracks, when used in common at the point of connection, may be considered the depot and track of each relatively to its own operations and business; and that the one company must protect its own passengers, who are not themselves at fault, against injury from the trains of the other company; though for negligence, exclusively of the other company, while its own passenger was out of his proper place, the responsibility would be different.¹ And the general rule appears to be that, if the carrier plainly undertakes to carry his passenger to a certain point, he undertakes that the intermediate means employed for that purpose, such as a ferry-boat to cross a stream, or tracks of another road used to run upon, shall be in due order, and just as fit for transportation as though they were his own for the time being.²

There is, however, some seeming discrepancy in the authorities in this respect. Where one railway used rightfully the tracks of another, and a collision occurred because of the negligence of the company owning the tracks in disobeying signals, it was recently held in England that the innocent company could not be sued for injuries sustained in consequence by one of its own passengers.³ And some American authorities, too, decline to hold a railway company responsible, which rightfully runs cars upon another railroad, so far

¹ *Central R. v. Perry*, 58 Ga. 461. And see *Foulkes v. Metropolitan R.*, 4 C. P. D. 267.

² *Great Western R. v. Blake*, 7 H. & N. 987; *Thomas v. Rhymney R.*, L. R. 5 Q. B. 226; L. R. 6 Q. B. 266; *McLean v. Burbank*, 11 Minn. 277; *John v. Bacon*, L. R. 5 C. P. 437; *Railroad Co. v. Barron*, 5 Wall. 90.

³ *Wright v. Midland R.*, L. R. 8 Ex. 137; distinguishing *Great Western R. v. Blake*, 7 H. & N. 987; *Thomas v. Rhymney R.*, L. R. 5 Q. B. 226; L. R. 6 Q. B. 266.

as the passenger's injury proves to have been occasioned without its own fault, but by the misconduct or negligence of operatives of that road entirely out of its own control.¹ All this, however, only confirms the theory that where passenger injury is the issue, the culpable carrier is the proper one to sue, and not others having business association with such carrier who were non-contributors to the wrong.²

§ 618. **The same Subject; Control of the Transportation.**—

A passenger on a construction train run by contractors who are building the road cannot hold the contractors liable as public carriers of passengers;³ nor, on the other hand, the company not yet operating the road.⁴ But, though a carrier convey while the motive power is supplied by the State and under State agents, or others, in fact, operate for a whole or part of the distance, his contract obligation towards the passenger he transports may render him nevertheless immediately answerable;⁵ nor is it for such carrier to set up a void lease or *ultra vires* in avoidance of his own responsibility voluntarily assumed.⁶ In general, an ordinary passenger, who pays, without deduction, the regular fare, shall not readily be assumed to have consented that the carrier's liability shall be shifted upon others, or that the responsibilities shall be other than the law prescribes.⁷

¹ *Sprague v. Smith*, 29 Vt. 421.

² See 3 McCr. 208. A passenger who receives damage by reason of a collision for which two carriers are to blame, may recover against either or both. *Tompkins v. R.* (Col.), 19 Rep. 70.

³ *Shoemaker v. Kingsbury*, 12 Wall. 369.

⁴ *Kansas R. v. Fitzsimmons*, 18 Kans. 34, and cases cited.

⁵ *Peters v. Rylands*, 20 Penn. St. 497.

⁶ *Feital v. Middlesex R.*, 109 Mass. 398. And see *Daniel v. Metropolitan R.*, L. R. 5 H. L. 45. A street-car company cannot exempt itself from injury to passengers, by showing that its tracks were located by authority of the city. (Md.) 5 Atl. 346. A receiver in charge of an insolvent railroad may be sued in his representative character when the passenger is injured. *Little v. Dusenberry*, 46 N. J. L. 614; 108 U. S. 188.

⁷ See *White v. Fitchburg R.*, 136 Mass. 321, where the passenger in a

Where, on the other hand, one railway company receives upon its track the cars of another company, places them under the control of its agents and servants, and draws them by its locomotive, over its own road, to their place of destination, it is held to have assumed toward the passengers thus accepted the relation of common carriers of passengers, with the liabilities incidental to that relation.¹ The obligation thus created is, at all events, that of one who is bound to provide, after the usual standard applicable to passenger-carriers, means and facilities suitable to the transportation; and the practical effect to render the carrier, whose negligence or misconduct causes the mischief, liable to the passenger, whatever be his remedy as concerns the company with which he contracted for a through transportation.² For it does not necessarily follow that because the injured passenger may seek redress against one company, he cannot, at his election, hold the other responsible instead, especially if that other be the carrier who commits the injury.

§ 619. **Conclusion as to the Responsible Transporter.**—Perhaps, on the whole, these perplexing questions may be best solved by reference to that fundamental principle so often applied in the bailment of goods, which recognizes the creation of an agency for purposes incidental to performing the transportation, whether by virtue of special contract or one's public undertaking; but limits such agency to fulfilling those requirements which constitute a due performance of the principal transporter's obligation, and, beyond making the principal broadly answerable for his servant's or subordinate's performance of the duty intrusted to him, refuses to recognize an agency extending to the commission of positive wrong. The conclusion would then be that injury directly

car of one company, was allowed to sue it for the carelessness of the brakeman of another company, while coupling the cars of the two roads.

¹ *Schopman v. Boston & Worcester R.*, 9 Cush. 24.

² *Ib.*

resulting from the commission of a tort must be visited upon the wrong-doer or the contributor to that wrong; and not upon the principal contracting party by mere virtue of his contract; while it would be otherwise, where simply the contract of transportation was broken, as, for instance, through the refusal of a connecting carrier to recognize the purchased ticket, or in case of transportation without the promised means or facilities, or with unreasonable delay and annoyance. Here is a principle, frequently recognized, though, it must be confessed, not applied without producing some confusion; and yet, if it produce less confusion than before, it is worth marking.

§ 620. **Who are Passengers.** — 2. The direct obligations of a passenger-carrier attach with peculiar reference to passengers, notwithstanding a duty, doubtless, rests upon every such party, on grounds of general humanity and respect for the rights of others, to so perform the transportation service as not wantonly or carelessly to be an aggressor towards third persons, whether such third persons be on or off the vehicle. A passenger, in the legal sense, is no trespasser upon the carrier, but one who has rightfully taken a place in a public conveyance, or has been otherwise accepted, for the purpose of being transported from one place to another.¹ The obligations of the carrier to receive and carry passengers safely will be found, by analogy of the common law, to be graded considerably according to the expectation of a recompense from the particular individual transported; so that the important issue will often be raised whether the passenger was a free passenger or one for the payment of fare; this issue having a bearing upon the question, not only of liability for one's baggage, but, in a much narrower sense, of liability for the person himself.

Penal statutes, independently of the carrier's own contract, may render it important to determine whether one is a

¹ See Bouv. Dict. "Passenger."

“passenger” or a mere trespasser, or, once more, a servant or employé of the passenger-carrier. A person on a vehicle or train travelling as passengers usually travel may be presumed a passenger.¹ One who is employed on hire or for his perquisites, to perform certain duties in connection with the transportation, may be pronounced a servant of the carrier; but where one pays the carrier, instead, for his travel and the privilege of transacting a business of his own on the conveyance, such as selling popped-corn, books, or papers, or keeping a bar or restaurant for the convenience of general travellers, even though he is to perform certain convenient functions besides, as part of the consideration, like serving iced water, or taking charge of express matter, he is rather to be held a passenger allowed to exercise special privileges under a special contract.² A minor child may be a passenger.³ Express agents or mail agents may be transported free, or upon special terms of favor; so may a seller of newspapers or refreshments;⁴ and so, too, may season-ticket passengers, and the holders generally of free passes; and yet these are properly denominated passengers.⁵ But where one steals a free ride, or, without the knowledge and consent of

¹ *Louisville R. v. Thompson* (Ind.), 9 N. E. 357.

² *Commonwealth v. Vermont R.*, 103 Mass. 7; *Yeomans v. Contra Costa Steam Nav. Co.*, 44 Cal. 71.

³ (Mo.) 2 S. W. 315; (Mass.) 8 N. E. 875.

⁴ *Griswold v. N. Y. R.*, 53 Conn. 371.

⁵ *Hammond v. North-Eastern R.*, 6 S. C. 130; *Steamboat New World v. King*, 16 How. 469; *Great Northern R. v. Harrison*, 10 Ex. 376. As to the rights of free passengers, see c. 2. A drover travelling on a railway in charge of animals, on a free pass, is in effect a passenger for hire. *Little Rock R. v. Miles*, 40 Ark. 298; *Maslin v. Baltimore R.*, 14 W. Va. 180. But cf. 17 Fed. R. 671; 64 Wis. 447; *Camden R. v. Bausch* (Penn.), 7 Atl. 731. And as to one not *bona fide* travelling thus, see *Gardner v. New Haven R.*, 51 Conn. 143. A route or mail-agent in the employ of the United States is a “passenger” while travelling in pursuance of duty. 96 Penn. St. 256, construing local statute; 95 N. Y. 562.

As to whether one injured was a passenger or servant, see *Texas R. v. Scott*, 64 Tex. 549.

the carrier or his proper agent, goes on board with the intent of travelling without payment, or fraudulently uses another person's pass, or passes by mistake for one entitled to go free when he was not such, he is not a passenger, but rather a trespasser.¹ Even if the conductor or other employé of the carrier allows him to travel free or takes a perquisite for the ride, he should not be concluded a passenger, especially if riding where passengers have no right to be.²

§ 621. **The same Subject.**—The character of the conveyance may affect such an issue, especially in the case of railway-carrier companies, which habitually run freight trains and passenger trains separately. Where a railway once admits a practice of conveying passengers for hire on its freight trains, especially if some fair sort of accommodation like a caboose is afforded them, the company may incur the relation towards an individual who in good faith takes passage in such a car, intending to pay the fare; for any restriction of this sort of permitted transit to particular trains is so out of course that some notice thereof ought to be brought home to the party.³ And doubtless one may by due authority be accepted as passenger on a freight train,⁴ or even a construction train,⁵ or a hand car,⁶ notwithstanding the carrier's private orders on the subject. But where the company has not in fact admitted any such practice, and its responsible managers forbid it, one who rides free in a caboose on a

¹ *Union Pacific R. v. Nichols*, 8 Kans. 505. It is here expressly stated that the honest belief of such a traveller that he was on board rightfully, and entitled to go free, does not affect the issue of the carrier's liability for him as a "passenger." And see *Toledo R. v. Beggs*, 85 Ill. 80; *Muelhausen v. St. Louis R. (Mo.)* 2 S. W. 315.

² *Rucker v. Missouri Pacific R.*, 61 Tex. 499; *Higgins v. Cherokee R.*, 73 Ga. 149; § 621.

³ *Lucas v. Milwaukee R.*, 33 Wis. 41; 2 *Redfield Railways*, 216-231.

⁴ *Ohio & Mississippi R. v. Dickerson*, 59 Ind. 317, and cases cited; 64 Tex. 529.

⁵ *St. Joseph R. v. Wheeler*, 35 Kan. 185.

⁶ 64 Tex. 144.

freight train, afforded for employés only, or in some other unauthorized and unsafe place for passengers, cannot claim that the passenger relation existed, even though the conductor of the train or some other employé invited him to ride.¹ The case becomes more complex when the instance is that of one lawfully a passenger, who passes to a place in the vehicle or on the train where passengers are never presumably permitted to ride, and the more so when the agent in charge of the carriage gave no sanction to his act; as, for instance, if a steamship passenger should, without due permission, climb into the rigging, or one by railway ride upon the locomotive, and there receive an injury. And whether such a party be regarded as not a passenger *pro hac vice*, and not rather (since the logic of the case permits it) a negligent contributor to his own injury, it would appear that, to a considerable extent, the carrier could fairly set up such act in his own exoneration.² But on the more favorable showing that the party was merely in a part of the vehicle or on a car of the train where his ticket did not properly allow him to remain, and yet suitable enough for his safe conveyance, one could claim to be a full passenger, the more so if the conductor knowingly permitted him to stay there;³ though not, even here, so as to free the case wholly from the same consideration of contributory negligence; while such a ride without the carrier's due permis-

¹ *Lygo v. Newbold*, 9 Ex. 302; *Eaton v. Delaware R.*, 57 N. Y. 382; *Higgins v. Cherokee R.*, 73 Ga. 149; *Perkins v. Chicago R.*, 60 Miss. 726.

² See *Robertson v. New York R.*, 22 Barb. 91; *Chicago R. v. Michie*, 83 Ill. 427; *Higgins v. Hannibal R.*, 36 Mo. 418; *Little Rock R. v. Miles*, 40 Ark. 298; *Rucker v. Missouri Pacific R.*, 61 Tex. 499. One who rides on an engine with due permission is not debarred from suing for his personal injury. 17 Fed. R. 671. But a station agent is not the proper person to give permission to ride on top of a car, those in charge of the train knowing nothing about it. 40 Ark. 298.

³ *Dunn v. Grand Trunk R.*, 58 Me. 187; *Creed v. Penn. R.*, 86 Penn. St. 139. See next chapter as to the carrier's liability, where the subject is more suitably discussed at length.

sion and knowledge must always obstruct his right of action to recover for injuries which would not have occurred had he been in his proper place.¹

* One who has his ticket, and is present to take the car or other vehicle at the starting-place, is a passenger, though he may not have actually entered the vehicle; for the passenger *status* takes effect from the time when the carrier has accepted the party, so to speak, for present transportation.² More than this, there may be an acceptance of a party as passenger before even the ticket is bought or the fare paid; as where an omnibus-driver (whose fare is usually payable after customers enter the vehicle) pulls up in response to the signal of a person in the street, who wishes a ride.³ One may be an accepted passenger while waiting for the vehicle or entering or leaving it;⁴ or a paying passenger without necessarily paying in advance.⁵

§ 622. **Obligation to receive for Carriage.** — 3. With respect to one's obligation to receive for carriage, the carrier of passengers is bound, according to his means and methods, as held out to the public, to receive all fit persons who may choose to apply and are ready and willing to pay for the transportation; the ground of this obligation being, not a mere private contract, at one's own choice, but the fact that the passenger-carrier sets up, like an innkeeper or common carrier of goods, to exercise a common public employment for compensation.⁶ To the means, the methods, and the requirement of a recompense, apply quite closely the rules, with their quali-

¹ Kentucky Central R. v. Thomas, 79 Ky. 160.

² See Central R. v. Perry, 58 Ga. 461. And see Packet Co. v. Clough, 20 Wall. 528.

³ Brien v. Bennett, 8 C. & P. 224.

⁴ 136 Mass. 552; 97 N. Y. 494; McDonough v. Metropolitan R., 137 Mass. 210; Smith v. St. Paul R., 32 Minn. 1.

⁵ Nashville R. v. Messino, 1 Sneed, 220.

⁶ Story Bailm. § 591; Bretherton v. Wood, 3 Brod. & B. 54; Jencks v. Coleman, 2 Sumner, 221. See Benett v. Peninsular Co., 6 C. B. 775.

fications, which were set forth under the head of Common Carriers.¹

Thus, a free selection of patrons is not permitted the carrier of passengers; but all who require a passage must be received, so long as the carrier has room and there is no legal excuse for refusing the particular party.² It is not a lawful excuse that the carrier runs his coach or cars in connection with another carrier who extends the line to a certain place, and has agreed with such carrier not to receive passengers who come from that place, generally or on certain days, unless they come by his conveyance;³ for this would be to pursue a public vocation with respect of persons.

§ 623. **The same Subject; Accommodations; Suitable Persons, etc.** — But the obligation to receive has qualifications, as our statement indicates, and analogous, indeed, to those observed in treating of common carriers of goods. The carrier of passengers may stop receiving when his vehicle is full, nor need he accept passengers to travel by other modes of conveyance or other vehicles, or upon different journeys, with different stopping-places and at different times, from what he holds himself out as ready to furnish or perform.⁴ One whose vocation extends to both passengers and freight, like a railway carrier, is not bound to carry freight on passenger vehicles or by passenger trains, nor passengers on freight vehicles or by freight trains; but he may regulate fairly for himself how the double duty shall be performed.⁵ Nor can a carrier be compelled to take passengers on Sunday.⁶ We have ob-

¹ *Supra*, §§ 373-381. Even a sleeping-car company has no right to discriminate in selling its vacant berths. *Nevin v. Pullman Car Co.*, 106 Ill. 222.

² *Bennett v. Dutton*, 10 N. H. 481; *Bretherton v. Wood*, 3 Brod. & B. 54; *Massiter v. Cooper*, 4 Esp. 260; *Tarbell v. Central R.*, 34 Cal. 616.

³ *Bennett v. Dutton*, 10 N. H. 481.

⁴ *Supra*, §§ 373-381.

⁵ *Arnold v. Illinois Central R.*, 83 Ill. 273, 280, and cases cited.

⁶ *Walsh v. Chicago R.*, 42 Wis. 23. Though he may waive his right

served, however, that a carrier may waive his rights in these and kindred respects; and where, as is now so usual, passage-tickets are sold or given out in advance without any express proviso as to there being room, the undertaking assumed on the carrier's part is to furnish room to all who have tickets; this principle applying generally to the unqualified reception of passage-fares by the carrier or his proper agent, though manifestly most appropriate to railway travelling, where cars are so constantly attached to each train, not by advance computation, but according to the number of persons who may present themselves at the time advertised.¹ A passenger who has thus paid his fare is entitled to due accommodation, especially if he is to go a long distance; and if he finds the ordinary cars of his train full, he cannot be treated as a trespasser when he goes into a drawing-room car, ladies' car, or other higher-priced or special conveyance, under the same management, for the particular transportation, there to remain until there is a vacant seat for him in the ordinary cars;² though he is not justified in exposing himself carelessly and needlessly to danger where he has no seat.³ The contract embodied in the sale of a ticket may of course limit one's right of accommodation to some particular trip or train.

The carrier of passengers is only bound to accept and carry persons who are suitable; a qualification in his favor which must be very guardedly observed, partly with a view to his personal advantage, but more for making the journey reasonably

in this respect very considerably. *Feital v. Middlesex R.*, 109 Mass. 398; *Carroll v. Staten Island R.*, 58 N. Y. 126.

¹ See *Hawcroft v. Great Northern R.*, 8 E. L. & Eq. 362; 16 Jur. 196. A carrier by ferry-boat, who provides the number of seats demanded by the average travel, is not remiss in duty if persons are sometimes without seats. *Burton v. Ferry Co.*, 114 U. S. 474

² *Thorpe v. N. Y. Central R.*, 76 N. Y. 402; *Davis v. Kansas City R.*, 53 Mo. 317; *Bass v. Chicago R.*, 36 Wis. 450. See further, *post*.

³ *Camden R. v. Hoosey*, 99 Penn. St. 492.

convenient, comfortable, and decent for the public. For instance, transportation and admission to the carrier's premises may be refused to one who seeks to avail himself of such opportunity so as to injure the carrier's own business by soliciting patronage for a rival line;¹ for while the carrier may not subject his passengers to an oppressive monopoly, it appears well conceded that he has the right to keep to himself the legitimate advantages of his position, such as establishing an exclusive agency for the delivery of the passengers' baggage contained on board the car or vessel, giving some other carrier the monopoly of his connecting patronage, or furnishing a refreshment-table, as a convenience to those he transports, and a source of special profit to himself.² Again, the carrier is not obliged to accept one who is openly at the time or even habitually drunk, gross in his behavior or obscene in his language, lewd, noisy, and quarrelsome, so as to become a public annoyance to the other patrons;³ though discrimination among persons for merely habitual and not actual and present misbehavior of this sort must of course involve a perilous responsibility in these days, when travelling has become so universal. Nor is the carrier obliged to receive as passengers notorious thieves, pickpockets, gamblers, or other criminals, nor fugitives from justice, nor persons infected with contagious diseases; since respect for the laws, and the vital interests of the carrier himself and the general passengers, besides, demand the exclusion — and where life and health would be imperilled, the imperative exclusion — of all such persons.⁴ Yet, in all instances like these, acceptance of the fare

¹ *Jencks v. Coleman*, 2 Sumn. 221, 224; *Story Bailm.* § 591 *a*; *Barney v. Oyster Bay Steamboat Co.*, 67 N. Y. 301; *The Martin*, 11 Blatchf. 233.

² *Ib.*

³ See *Story Bailm.* § 591 *a*; *Mr. Justice Story in Jencks v. Coleman*, 2 Sumn. 221, 224, 225; 33 Kan. 543.

⁴ See *Dundy, J., in Thurston v. Union Pacific R.*, 4 Dill. 321. But as to fugitives from justice, see *Pearson v. Duane*, 4 Wall. 605, — a case of exceptional circumstances.

from any one is so far a waiver of the carrier's right to refuse admission that the carrier ought carefully to refuse selling tickets to such persons, and to exclude them if they attempt to enter the vehicle without tickets; he should at least refund readily whatever may have been paid for passage on their behalf; and if, inadvertently, such a person is admitted without some previous notice that his transportation is forbidden, the carrier incurs the risk of a suit where he ejects him afterwards, especially if no previous offer be made to refund whatever fare the party may have paid, and the ground of ejection is simply that of habitual, and not present offence.¹

§ 624. **Carrier's Reasonable Rules as to Accommodation.**— Closely associated with this qualification of the obligation to receive is the carrier's right of making and enforcing wholesome and reasonable regulations as to accommodation on behalf of himself and those he transports. Thus, the passenger-carrier by railway may, it is held, set apart, in the first instance, a special "ladies' car" for women who travel alone or with their male relatives or friends; and this to the extent of forcibly removing any male who enters the car unaccompanied by a female;² and saloons, drawing-rooms, and state-rooms on a steamer or other passenger vessel may doubtless be set apart for a similar purpose. As to the right of excluding persons of color from certain cars or vehicles, or confining them to a particular car or a particular quarter when travelling, judicial opinion in this country has fluctuated somewhat with the vicissitudes of public opinion regarding the interest-

¹ *Putnam v. Broadway R.*, 55 N. Y. 108; *Thurston v. Union Pacific R.*, 4 Dill. 321. As to permitting one to take a man on board as an officer who has him under arrest, see 87 Mo. 422. "Non-union" workmen are not to be excluded from travelling upon any suggestion that they are unpopular. *Chicago R. v. Pillsbury (Ill.)*, 8 N. E. 803.

² *Peck v. New York Central R.*, 70 N. Y. 587; *Putnam v. Broadway R.*, 55 N. Y. 108, and cases cited; *Bass v. Chicago R.*, 36 Wis. 450; *Chicago R. v. Williams*, 55 Ill. 185. *A fortiori*, if the man was sent politely to another car. 94 N. C. 318.

ing question of negro rights ; nor inconsistently so, since the reasonableness of a carrier's regulations at any period or place ought not to be tested regardless of social prejudice and prevailing manners among the travelling public. Yet the more intelligent opinion of this day denies utterly the right to exclude negroes from travelling by the usual facilities, and hesitates to shut persons, decent and respectable in appearance, character, and behavior, off by themselves, or to deny them comforts they can pay for, merely because of their color.¹ And it is rightly held that the simple fact that a car or saloon is designated for use by "ladies," or "females," or "women," does not warrant the carrier's refusal of its privileges to a black lady, female, or woman, who occupies the fair general footing of a passenger.²

To speak more generally, distinctions in the means of transportation furnished, on considerations not of sex but of social caste, appear more openly admissible in England and European countries than in America, where such distinctions are averse to the spirit of our institutions ; and yet of late years, particularly in railway travel, there has been a growing disposition manifested to run special drawing-room car trains, and furnish such special quarters and special facilities as practically to adopt and establish in the United States the foreign fashion of travelling by first-class and second-class cars. The only rational ground for maintaining such distinctions, so far as they are rational at all, must, to citizens of a free republic, appear this : that a gradation of passage rates justifies a gradation of accommodations ; but that every public carrier of passengers should afford reasonable and safe facilities for all who pay their fares and travel. The carrier

¹ See *Day v. Owen*, 5 Mich. 520; *Turner v. North Beach R.*, 34 Cal. 594; *West Chester R. v. Miles*, 55 Penn. St. 209; *Chicago R. v. Williams*, 55 Ill. 185; *Decuir v. Benson*, 27 La. Ann. 1; *Britton v. Atlanta R.*, 88 N. C. 536.

² *Chicago R. v. Williams*, 55 Ill. 185.

has no right to provide for the comfort of one sex, or of the higher-price passengers, to the neglect of the other sex, or of those who pay the ordinary rates.¹ And, whatever the carrier's regulations, they must be neither unreasonable nor unreasonably enforced.²

§ 625. **Passage Tickets and Fares.** — 4. Next, to touch upon a topic greatly developed by recent cases, namely, passage-tickets and fares. As a further qualification of the passenger-carrier's obligation to receive for carriage is that right which the law concedes to all who exercise a public calling, of requiring due recompense; and while, on the one hand, such a carrier can demand no extortionate or unreasonable reward from any one, such as might amount to a practical exclusion or hindrance from travel, he may unquestionably require to be paid his reasonable charges, and paid, too, in advance.³ As compared with the modern practice among common carriers of goods, there are three aspects in which that among common carriers of passengers appears strikingly different: 1. The passenger-carrier usually receives his recompense from the patron or customer in advance, occasionally on the way, and only very seldom at the termination of the transit; and that greatest of inland transporters, the railway carrier, commonly discriminates thus between travelling patrons and the consignors of freight. 2. The passenger-carrier has little to do with variable tariffs of rates, such as, computed *ad valorem* or *pro rata*, might render the particular recompense in a case difficult to adjust; still less, with special charges of transit against the customer. He commonly grades his accommodations and facilities, however, on a well-considered scale of prices, leaving the passenger to select

¹ See *supra*, § 622.

² *Jennings v. Great Northern R.*, L. R. 1 Q. B. 7. The subject of the carrier's rules and regulations, in their wider bearings, will be more fully discussed in the next chapter.

³ *Story Bailm.* § 603; *Angell Carriers*, §§ 525, 530, 609; *Ker v. Mountain*, 1 Esp. 27; 11 Neb. 177; cases *post*.

and pay according to choice; he discounts, too, his rates to season-ticket holders or purchasers by the quantity, or on a round trip, while allowing others to travel on terms of marked favor, or even free. 3. The almost universal use of passage-tickets in such transactions, which are issued before the journey, and serve on the way as the voucher of the passenger's right to be in the vehicle, virtually concedes (subject to their own special limitations and those of passes granted to special individuals only) that the bearer's fare has been already paid the carrier, and that, whoever such party may be, the right to exclude on any ground is waived, and he is accepted as a passenger subject to the limitations of such ticket, with the usual rights and subject to the usual rules.

A party, then, who has once paid his passage-fare, and can produce his proper ticket, is not, as a rule, to be treated differently from other passengers of the same class, nor refused admission to the cars or vehicle; but if good cause really exist for his immediate exclusion, which the carrier ought, in justice to himself, and out of regard to the other passengers, to insist upon, the fare must, at all events, be tendered back or refunded; and damages against the carrier for his breach of contract to carry, after the usual mode, to the journey's end ought, under such circumstances, to be heavy where the exclusion is without justice and good reason,¹ especially if the party while not actually misbehaving is excluded in a contemptuous, insulting, and scandalous manner.²

§ 626. **The same Subject; Reasonableness of Fare, etc. —** In prescribing rates of carriage, the carrier of passengers, when unrestrained by statute, may charge whatever he please, provided the charge be not extortionate, oppressive, or unreasonable; nor, as it would appear, is the charge made to

¹ See *Chicago R. v. Williams*, 54 Ill. 185; *Thurston v. Union Pacific R.*, 4 Dill. 321; *Pearson v. Duane*, 4 Wall. 605.

² *Coppin v. Braithwaite*, 8 Jur. 875, Ex.; *Angell Carriers*, § 532. And see next chapter, as to ejecting passengers.

one passenger conclusive of what should be made to another, since the common law requires, not that all should be charged alike, but that none should be charged unreasonably high.¹ But public policy tends to the view that the grant of anything like a monopoly of carriage facilities to individuals or a class ought to be discountenanced; and while equality of rates for the same facilities must always appear reasonable, inequality is evidence of unreasonableness.²

§ 627. **Contract evinced by Ticket, etc.** — Further than this, the modern ticket system is fundamentally one of special contract, and subject to the special-contract rules we have elsewhere detailed, in most leading respects; though some cases prefer to treat the ticket as a mere token or voucher, showing that one has paid his fare and is entitled to a passage as indicated;³ and certainly it is not evidence of a contract in any such sense as to comprehend and conclude the actual terms of passage, and merge all other parol or written arrangements in point.⁴ As construed in the light of custom, the language of

¹ *Supra*, §§ 374, 375.

² *Ib.* And see § 630 *post*.

³ *Elmore v. Sands*, 54 N. Y. 512, 515, and cases cited, per Earl, C.

⁴ *Van Buskirk v. Roberts*, 31 N. Y. 661; *Quimby v. Vanderbilt*, 17 N. Y. 306.

It is seldom, if ever, that a mere ticket professes to contain all the essential terms of the understanding between passenger and carrier; though it may establish this understanding in various particulars, including the qualifications in respect of baggage liability. The full agreement as to passage is derived largely from schedules which give the time-tables, etc., and general rules, so far as these are brought before the public, and may fulfil the requirement of usage or a special contract with the party himself; or from special statements made by the carrier or by his proper agents, whether by way of extension or waiver of the usual conditions. To quote from the language of a recent case: "As either party may prove terms of the contract, not expressed upon the ticket, so either party may prove the acceptance, or rejection, or waiver of any terms thereon indorsed. The ticket is not a written contract signed by the parties. It is, at most, evidence of some existing contract for a passage between two places named, and that the holder has paid the fare demanded." *Danforth, J.*, in *Burnham v. Grand Trunk R.*, 63 Me. 298, 301. And see, *supra*, §§ 466-474.

the usual passenger-ticket, however briefly expressed, indicates the terminus of the particular journey, and imports a promise on the carrier's part to take the passenger, or presumably the bearer, through with the usual despatch and facilities, and by the usual means, subject to the usual qualifications permitted by law, from the starting-place to the point of destination. Custom among carriers or legislation may come in aid or control of the terms of this character to expand or expound them. Nor is it unusual for the carrier's posters, advertisements, or circulars to indicate to the public the schedule of fares, as well as the time-table, besides other material points of information of special interest to travellers.

One who buys his ticket relying upon its terms and upon the published schedule, as he has a right to do, accepts, in fact, the benefits of the carrier's public offer, and can claim all the reasonable advantages of such special contract.¹ As to disadvantages, the passenger in general may be held bound by his knowledge and assent to the special terms, so far as reasonable facilities and means of conveyance are concerned; though, as we shall see hereafter, it is not so certain that the carrier may thereby relax the duty he owes, of carrying human beings with due care of life and health; for, even as to passengers carried free, the carrier is not usually regarded as discharging himself of his general obligation in that respect.² In this confined sense, however, the passenger cannot plead, as it would appear, that he did not read what his ticket plainly stated;³ and a reasonable and customary rule of carriage, independently of his actual

¹ See *Denton v. Great Northern R.*, 5 E. & B. 860; *Sears v. Eastern R.*, 14 Allen, 433, 436; *Hobbs v. London R.*, L. R. 10 Q. B. 111; *Le Blanche v. London R.*, 1 C. P. D. 286; 8 E. L. & Eq. 362.

² See next c.; *Todd v. Old Colony R.*, 3 Allen, 18; *Angell Carriers*, § 529; *Steamboat New World v. King*, 16 How. 469; *Gillenwater v. Madison R.*, 5 Ind. 339; 108 Mass. 7.

³ *Boston & Lowell R. v. Proctor*, 1 Allen, 267.

knowledge or assent, might be held to bind him as a passenger.¹

§ 628. **The same Subject; Differing Rates import Differing Facilities.** — Facilities and means of passenger transportation are, in fact, regulated constantly by a difference of rates; and the passenger who agrees to go at the lesser fare may have to accept the lesser conveniences. Ordinary rates of fare imply that the passenger shall be carried with the ordinary facilities in the choice of vehicle, time of starting, rapidity of journey, means of conveyance, and choice of seats.² Adults and children, who may be charged differently, are ordinarily accepted together upon such an understanding; for the basis of such difference in rates is a difference in age and development;³ though it seems not unreasonable on street-cars, or for short distances, to prescribe lesser facilities as to seats, for children who pay the lesser rates, than for grown people. Season-ticket holders, or those who purchase tickets by the quantity or round-trip tickets, may be presumed entitled to the usual facilities; though special conditions are sometimes found to accompany such reduction of rates.⁴ In England and European countries are cars of the first class, second class, and so on; the inferior car being furnished less luxuriously for the lesser fare; a custom which, though little prevalent in American railway travelling, so far as the gradation is directly concerned, finds an indirect following in the recent establishment

¹ See *State v. Goold*, 53 Me. 279; *Northern R. v. Page*, 22 Barb. 130. But as to the inconclusiveness of tickets, and the uncertain acceptance by the passenger of their special qualifications, so far as relates to baggage liability, see *post*, c. 4.

² See *Davis v. Kansas City R.*, 53 Mo. 317.

³ *Austin v. Great Western R.*, L. R. 2 Q. B. 442. An adult passenger may be treated as responsible for the fare of a child under his charge. *Philadelphia R. v. Hoefflich*, 62 Md. 300.

⁴ See *Woodard v. Eastern Counties R.*, 1 B. & S. 977, Am. ed.; 105 Penn. St. 142; *Ripley v. New Jersey R.*, 31 N. J. 388. As to a condition contained in a season-ticket, requiring its surrender or else the forfeiture of deposit-money, see *Cooper v. London R.*, 4 Ex. D. 88.

of "palace" and "drawing-room" cars, where special rates are demanded.¹ In travel by water, too, state-rooms are graded or made a special charge in like manner as compared with berths.

The natural and reasonable admission of all such distinctions as these is to establish a special contract between the carrier and his patrons, express or implied, whereby the party paying the higher rates travels with more seclusion and comfort, and perhaps may be privileged to go on special and limited trains, or at unusual times. And there may be, in corresponding manner, special limited tickets, issued at reduced rates, for particular trips only, or a continuous passage; and by such terms the purchaser is bound.² But the terms of the special undertaking, not well established already by usage or legislation, must be brought home to the passenger by ticket or otherwise; and where limited railway tickets are intended to restrict the holders to particular trains, and nevertheless purport on their face to entitle one to passage on any regular

¹ See *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Pullman Palace Car Co. v. Smith*, 73 Ill. 360; *supra*, § 624.

² A reduced-rate ticket, limited in time on its face, cannot be used after the time expires. *Pennington v. Philadelphia R.*, 62 Mo. 95. Even if the carrier were at fault and consequently responsible for preventing its full use, it does not follow that the ticket itself must be honored in disregard of its terms. 41 Ohio St. 276. Cf. 43 Ark. 529. But a ticket whose use expires on a certain day is good if one begins his journey before midnight on that day. *Auerbach v. N. Y. Central R.*, 89 N. Y. 281; *Georgia Southern R. v. Bigelow*, 68 Ga. 219; 11 Mo. App. 463; 66 Cal. 191. And where a limited ticket expires on a Sunday, and the carrier runs no train that day, he is bound to carry the passenger next day. 43 Ark. 529.

A reduced-rate ticket may be limited so as to be used only by a particular individual or individuals; and this is usually the case with season or mileage tickets, which are so expressed as not to be transferable at pleasure. Limited tickets sometimes require the buyer to be identified and have the ticket stamped for the return passage. See 17 Fed. R. 880; 23 Fed. R. 326; 73 Ga. 356. All such limitations, if intended, should be expressed, for tickets are presumed to be good for the bearer and transferable by a purchaser. 3 McCr. 249.

trains, the passenger cannot be excluded from the ordinary facilities and the usual trains, who believed himself entitled thereto; for general notice by poster ought, as American cases rule, to be brought seasonably to the particular passenger's attention, in order to bind him to the qualifications claimed by the carrier.¹ General advertisements do not vary the plainly express terms of the ticket itself.²

§ 629. **Special Restrictions of Carriage by Ticket, etc.** — Among the special qualifications contained in a passage-ticket, which have been ruled admissible, is this: that the ticket is "good for this trip only," or for the day dated; in the sense, of course, that the passenger shall have fair opportunity to reach his destination accordingly.³ And the same doctrine may be affirmed of coupon-tickets given over connecting routes, to enable one to travel beyond the terminus of the first carrier.⁴ But the usual fair understanding as to tickets, notwithstanding they happen to be dated, seems to be that the passenger, while not entitled to break a journey, may commence and finish it at a later day, if not unreasonably late after its purchase, and provided no special cause appear for a different interpretation of the carriage undertaking; in other words, that a fare-ticket sold upon no special limited contract, and for the ordinary accommodations in the vehicle,

¹ *Maroney v. Old Colony R.*, 106 Mass. 153. A round-trip ticket follows this rule; for round-trip tickets are presumed to be good until used, in absence of a special stipulation to the contrary in the ticket or actual notice to the buyer at the time of the purchase. *Pennsylvania R. v. Spicker*, 105 Penn. St. 142.

Conditions on a ticket, which are plainly expressed and in view of the rates charged are not unreasonable, bind the passenger; he cannot say that he did not read the ticket. 73 Ga. 356; 11 Phila. 597.

² *Howard v. Chicago R.*, 61 Miss. 191.

³ *State v. Overton*, 4 Zab. 435; *Cleveland R. v. Bartram*, 11 Ohio St. 457; *Johnson v. Concord R.*, 46 N. H. 213; *Cheney v. Boston & Maine R.*, 11 Met. 121; *Elmore v. Sands*, 54 N. Y. 512, a positive authority in point; *Dietrich v. Penn. R.*, 71 Penn. St. 432.

⁴ *Boston & Lowell R. v. Proctor*, 1 Allen, 267; *Shedd v. Troy & Boston R.*, 40 Vt. 88; *supra*, §§ 615-618.

without selection of place, is good for a continuous passage until used.¹ A ticket entitles one to travel between the stations named, but no farther.² So, if a railway ticket reads "Portland to Boston," this, it is held, does not allow one to travel from Boston to Portland, but only, according to its tenor, from Portland to Boston.³ Limitations, in point of time or trips, upon the use of passenger-tickets, if plainly expressed, are commonly sustained by the courts as reasonable; more especially where the tickets themselves are issued on especially favorable terms of fare, as in the case of excursion or round-trip, commutation, and season tickets;⁴ though such limitations should never be so narrow as to deny, practically, the full right of passage they profess to confer, nor understood in the sense that the carrier may profit by his own default of duty, to his patron's detriment.⁵

§ 630. **The same Subject; Reasonable Rules as to Tickets.**—Reasonable rules as to passage-fare may be imposed by the carrier in his interests or those of the general public. Thus, he may issue tickets which do not permit the passenger to stop over at pleasure; for it is both reasonable and customary to discriminate between through and local fares, so as to charge higher *pro rata* for the distance travelled in the latter

¹ See *Pier v. Finch*, 24 Barb. 514.

² *Great Western R. v. Pocock*, 41 L. T. 415.

³ *Keeley v. Boston & Maine R.*, 67 Me. 163. And see *Coleman v. New York R.*, 106 Mass. 160; 24 Am. Reports, 22, Thompson's note. *Seem*, if the ticket read, as is not uncommon, "Portland & Boston," no such restriction upon the direction of travel could be inferred.

⁴ *Hill v. Syracuse R.*, 63 N. Y. 101; *Lillis v. St. Louis R.*, 64 Mo. 461; *Powell v. Pittsburg R.*, 25 Ohio St. 70; *McElroy v. Railroad*, 7 Phil. 206. And see Thompson's valuable note, 24 Am. Reports, 22.

Where the carrier controls both a direct and a circuitous route between two points, it may more naturally be assumed that a restriction confines the passenger upon a through ticket to the direct route than to the circuitous one. See *Bennett v. New York Central R.*, 69 N. Y. 594.

⁵ *Little Rock R. v. Dean*, 43 Ark. 529. But see *Pennsylvania Co. v. Hine*, 41 Ohio St. 276.

case than in the former;¹ and quick transit is advantageous to through passengers besides. So may the carrier charge an additional rate where tickets are not purchased before the passenger goes on board the train or vehicle;² for it is not only a convenience in keeping his accounts, but a great safeguard against fraud, that the fare be taken by the carrier's agents specially appointed for that purpose; though this presupposes, in consistency, that the passenger is allowed such opportunity to purchase beforehand.³ The passenger, too, may be required to exhibit his ticket whenever called upon by the carrier, or by his proper representative; such as the clerk of a steamboat, the driver of a coach, or the conductor of a railway train;⁴ for this is taking a suitable precaution against

¹ *State v. Campbell*, 32 N. J. 309; *Cheney v. Boston & Maine R.*, 11 Met. 121; *Breen v. Texas R.*, 50 Tex. 43; *McClure v. Philadelphia R.*, 34 Md. 532; *Oil Creek R. v. Clark*, 72 Penn. St. 231.

² *Hilliard v. Goold*, 34 N. H. 230; *State v. Goold*, 53 Me. 279; *Chicago R. v. Parks*, 18 Ill. 460; *Cleveland R. v. Bartram*, 11 Ohio St. 457; *State v. Chovin*, 7 Iowa, 204; *Swan v. Manchester R.*, 132 Mass. 116.

³ See *St. Louis & Alton R. v. South*, 43 Ill. 176; *Nellis v. New York R.*, 30 N. Y. 505; *Chicago R. v. Parks*, 18 Ill. 460; *Crocker v. New London R.*, 24 Conn. 249; *Jeffersonville R. v. Rogers*, 28 Ind. 1. But it should be observed that, in fact, the allowance of a cheaper rate where tickets are purchased in advance may be by way only of abating or discounting the regular fare; which puts the question of charging on board the vehicle in a different light. See *Crocker v. New London R.*, and *State v. Goold, supra*. The rule of discount only where tickets are bought at the station is a reasonable one, and may be enforced on the train. *Cincinnati R. v. Skillman*, 39 Ohio St. 444. And the general rule appears to be, in this connection, that the ticket-seller is not bound to keep his office open after the advertised time for the train or vehicle to leave. *Swan v. Manchester R.*, 132 Mass. 116. In New York, however, a local statute requires ticket-offices at railway stations to be kept open a prescribed time before the train leaves. *Ib.* A passenger who finds the ticket office closed when he seasonably presents himself to purchase, cannot be required by the conductor to pay an unreasonable extra sum for his passage. 26 W. Va. 800. The practice on some roads is for the conductor to charge extra and give a drawback ticket presentable at any ticket office.

⁴ *Woodard v. Eastern Counties R.*, 1 B. & S. 977, Am. ed.; *Ripley v.*

imposition. So, too, on this and other grounds of convenience is the rule a reasonable one which compels the passenger to surrender his ticket on the way, and take a conductor's check or voucher, or perhaps, indeed, no voucher at all, whether the object be to enable him to stop over or not.¹ Or the restriction upon through coupon-tickets over connecting roads, that the passenger must not stop over, except at the places designated on each coupon;² or, as it would appear, that he must not stop over at all (unless the journey be unreasonably long and fatiguing if one may not break it), or that the coupons shall be worthless if detached;³ since this guards discreetly the privilege accorded to the passenger of making the through trip upon one moderate fare.⁴

But all regulations concerning fare must be not only reasonable of themselves, but interpreted in a reasonable manner as between carrier and passenger. Hence, whatever might be a conductor's or clerk's usual right to take up tickets on the journey, it is held that the conductor on a train ought not in reason to deprive the passenger of his ticket while much of the transit continues unperformed, so as to leave the latter

New Jersey R., 31 N. J. 388; *Baltimore & Ohio R. v. Blocher*, 27 Md. 277; *Hibbard v. New York & Erie R.*, 15 N. Y. 455. And see, as to enforcing this rule against commutation or season-ticket holders, *Downs v. New York R.*, 36 Conn. 287.

¹ *Northern R. v. Page*, 22 Barb. 130; *Beebe v. Ayres*, 28 Barb. 575.

² See § 629.

³ *Hartan v. Eastern R.*, 114 Mass. 44. Usually, coupon-tickets are expressed so as to require a continuous journey between two points named on each coupon. 43 Ark. 529.

⁴ See *Jerome v. Smith*, 48 Vt. 230. Tickets for continuous passage do not import a right to stop over and then resume the journey. 42 N. J. L. 419; 39 Ohio St. 375. But the law of some States recognizes a general right of stop-over on tickets. 72 Me. 388.

One who buys a limited ticket is bound not to take advantage of an opportunity to evade its terms. 88 N. C. 526. If it entitles one to ride only on a certain through train which does not stop at an intermediate station, the passenger who is carried beyond may have to pay fare for the additional distance. 11 Lea, 533.

party without any voucher showing his right to travel, and that under such circumstances the demand to surrender may be refused.¹ Nor should the rule that the passenger produce his ticket whenever required be enforced regardless of common sense and the conduct of the carrier and his servants rendering such production impossible;² and the carelessness of the carrier's conductor, as in substituting an unsuitable check for the ticket, cannot absolve the carrier from his legal obligation of giving a passage upon the terms and with the privileges actually stipulated.³ Nor ought a traveller, when asked to produce his ticket, be denied a reasonable time to find it; and this, particularly when the conductor or other agent demanding it knows that the passenger is no trespasser.⁴ In short, the reasonableness of all such regulations and their interpretation is usually a question of law for the court to determine.⁵

§ 631. **Special Instances; Lost Tickets; Travelling without Ticket, etc.** — If the passenger claims to have lost his ticket, and this is a transferable one such as the finder might ride with, he must, if required, pay his fare over; and so, too, where the driver or conductor could not, by dispensing with such repayment, relieve himself from pecuniary accountability

¹ *State v. Thompson*, 20 N. H. 250; 53 Md. 201. But cf. *Vedder v. Fellows*, 20 N. Y. 126.

² See *Baltimore & Ohio R. v. Blocher*, 27 Md. 277; *Dearden v. Townsend*, L. R. 1 Q. B. 10. In *Jennings v. Great Northern R.*, L. R. 1 Q. B. 7, a passenger bought tickets for himself and others of his household to go by a particular railway train, and the train was divided in two while he held all the tickets and the other members were in a different car, so that the party got separated. It was held, under the circumstances, that those who had not the tickets were excused from producing them.

³ *Palmer v. Railroad*, 3 S. C. 580; 64 Md. 63.

⁴ *Maples v. New York R.*, 38 Conn. 557. Indulgence should be shown to the old and decrepit, who are ignorant of travelling, if their conduct indicates good faith. *Louisville R. v. Fleming*, 14 Lea, 128. And see *Clark v. Wilmington R.*, 91 N. C. 506.

⁵ See *Jennings v. Great Northern R.*, L. R. 1 Q. B. 7; *Vedder v. Fellows*, 20 N. Y. 126.

to the principal who employs him.¹ But in other cases of loss, our courts incline to indulge the passenger, on the ground that the carrier has once received the actual consideration of the passage, and ought not to demand more if evidence be adduced of the fact.²

Where the carrier's rule, as promulgated, forbids passengers from being conveyed at all who have not first purchased their tickets (a rule which appears so out of course that one would hesitate to apply it rigidly to any traveller by an ordinary passenger conveyance, who commences his journey without being aware of it), this does not justify excluding a passenger who is ready and willing to pay his fare to the conductor, or other proper person in charge, when the carrier himself failed to furnish reasonable facilities for purchasing tickets in advance at the place of departure.³

§ 632. **Special Instances; Improper Tickets.**—If the passenger, when his fare is demanded, produces a ticket having a hole punched in it, or otherwise defaced in such a manner as commonly indicates that it has been used and cancelled, or shows a pass restricted by its terms to some other person, the presumption arises that he is trying to evade his just fare, and, unless he explains himself, or tenders promptly what is owing, he may be treated as an intruder.⁴ And the same may

¹ *Jerome v. Smith*, 48 Vt. 230; *Townsend v. New York Central R.*, 56 N. Y. 295.

² In *Pullman Palace Car Co. v. Reed*, 75 Ill. 125, this indulgence was accorded to one who had purchased his ticket for a berth in a sleeping-car. "We think the better rule is," observes Scholfield, J., "to require that, where the proof is clear and satisfactory, as it was in the present case, that the applicant for the berth has bought his ticket, but has lost it, and it is limited to the particular berth and trip, and the circumstances are such that it is reasonably certain the company cannot be defrauded by the ticket being in the hands of another, he should have the berth." And see *Maples v. New York R.*, 38 Conn. 557.

³ *Illinois Central R. v. Johnson*, 67 Ill. 312.

⁴ *Terre Haute R. v. Vanatta*, 21 Ill. 188; *Beebe v. Ayres*, 28 Barb. 275. For the English rule, see *Dearden v. Townsend*, L. R. 1 Q. B. 10; *McCarthy v. Dublin R.*, Irish Rep. 3 C. L. 511; *Austin v. Great Western*

be affirmed of one who attempts to use the detached coupon or return portion of a ticket plainly issued, as its terms indicate, so as not to have been transferable to him.¹ But a reasonable explanation, and compliance with the demand of a regular fare, ought to shut out controversy on such points.

§ 633. **Enforcement of Fares by Conductor, etc.**—The conductor or other directing agent of the carrier on the journey is expected to enforce the usual and customary rules respecting the payment of fares. And, as between the conductor and passenger on a railway train, the passenger's ticket, or the conductor's own substituted check, or some regular pass, must usually be deemed conclusive evidence of the passenger's right to travel at the time and place, and must be produced whenever reasonably called for;² in the absence of which a conductor is not to blame if he collect fare. A carrier of passengers may be shown to have waived his own usual terms of limitation, by appropriate acts and a continuous practice.³ But the conductor's mere permission to a passenger at other times to ride on an expired or unsuitable ticket, not brought home to the management so as to charge the carrier with the practice as a sanctioned one, cannot be set up on the passenger's behalf so as to excuse him on a particular occasion from paying the regular fare or suffering exclusion.⁴ Nor, of course, can the acts of other agents or parties who are charged with no duty respecting tickets or the collection of fares be deemed to vary the express terms of the contract between the passenger and the carrier himself.⁵

R., L. R. 2 Q. B. 442, where a mother travelled without paying her young child's fare. Offering a counterfeit bill for fare is no payment or tender of fare, and it should be refused. *Memphis R. v. Chastine*, 54 Miss. 503.

¹ *Langdon v. Howells*, 4 Q. B. D. 337.

² *Frederick v. Marquette R.*, 37 Mich. 342; *supra*, § 630.

³ *Burnham v. Grand Trunk R.*, 63 Me. 298.

⁴ *Sherman v. Chicago R.*, 40 Iowa, 45.

⁵ See *Wakefield v. South Boston R.*, 117 Mass. 544; *Wentz v. Erie R.*, 10 N. Y. Supr. 241; *Breen v. Texas R.*, 50 Tex. 43; *McClure v. Philadelphia R.*, 34 Md. 532.

Of the conductor's or captain's right to eject for the non-payment of one's proper fare, we shall speak in the next chapter; this right no doubt existing within prudent limits, though it should not be exercised with needless severity nor needlessly exercised at all.¹ A conductor has no right to accept a regular fare tendered him, and then exclude the passenger for not paying the additional sum charged those who fail to procure tickets before they go on board;² nor ought he to insist upon taking up the ticket tendered him by a passenger from whom he exacts a full fare, because of such ticket's invalidity.³ But he may rightfully demand the regular fare from any passenger who presents an invalid ticket, and refuse to recognize such ticket altogether.⁴

§ 634. **Whether Aggrieved Passenger may refuse Fare, etc.**—So strongly favored in respect of his accommodations is the passenger who has purchased a regular ticket, that the opinion is sometimes intimated that he may not only go into special cars or saloons and sit down there while his own car or saloon is too crowded to afford him a place, but he may even refuse to surrender his ticket until his demand for a seat is complied with.⁵ But, whatever his course, he must abide consistently by it; and if, under such circumstances, a proper seat be afterwards procured, and he takes it, he cannot then claim to keep the ticket instead and pay fare for only the remaining distance.⁶ Even when he is ejected for refusing his fare for want of a seat, it is held that he cannot recover damages for the ejection, but only for breach of contract to furnish a seat.⁷

¹ See next c.

² *Du Laurans v. St. Paul R.*, 15 Minn. 49.

³ *Vankirk v. Pennsylvania R.*, 76 Penn. St. 66; 14 Neb. 110.

⁴ And of course he may collect full fare where no ticket at all has been purchased.

⁵ *Supra*, § 623; *Davis v. Kansas City R.*, 53 Mo. 317.

⁶ *Davis v. Kansas City R.*, 53 Mo. 317.

⁷ *St. Louis R. v. Leigh*, 45 Ark. 368.

A passenger may decline to leave the train or vehicle, if rightly on board, notwithstanding the conductor or directing agent of the journey refuses to recognize his ticket.¹

§ 635. **Ticket-Seller's Representations, how far binding.**—The regular ticket-seller of a railway or other carrier binds the company, generally speaking, by his representations to the purchaser which are not plainly contradicted by other obvious proof of the carrier's intention; and a traveller may rely with more confidence upon his assurance concerning fares and tickets, and the contract obligations they import, than that of any conductor.² If such authorized agent sells a ticket as good when it is not, and the conductor refuses to honor it, the carrier may be held liable;³ and more than this (as it has been lately ruled), where a passenger who buys a railroad ticket of the authorized agent, believing in good faith that it is genuine and issued rightfully, tells the conductor of the train so, the latter is bound to take such facts as true, without regard to any words, figures, or marks which may appear upon the ticket.⁴

§ 636. **Aggrieved Passenger's Right of Action; Damages, etc.**—5. Next, to consider the right of action against the carrier for his inexcusable refusal or failure to receive. The

¹ *Hufford v. Grand Rapids R.*, 53 Mich. 118.

² *Murdock v. Boston & Albany R.*, 137 Mass. 293; 24 Hun, 51. In *Petrie v. Penn. R.*, 42 N. J. L. 449, the mere permission of a first conductor was held insufficient to confer the right to stop over on a ticket which was given for continuous passage.

³ *Ib.* But as to the unauthorized sale of tickets by the ticket agent, cf. 53 Tex. 564.

So may railway passengers rely, until differently informed, upon what ticket agents or train agents tell them as to the stoppage of trains; not, however, in disregard of other reasonable means of information. *Lake Shore R. v. Pierce*, 47 Mich. 277. As to sales of railroad tickets by unauthorized agents, see 100 Penn. St. 259.

⁴ And the ejection of a passenger under such circumstances is visited upon the company in damages as for an assault. *Hufford v. Grand Rapids R.* (Mich.), 31 N. W. 544.

carrier's inexcusable refusal to carry or admit to the premises of transportation may be actionable, even though unaccompanied by personal violence; for the party excluded need not wait to be maltreated, nor try to force his way into the vehicle, in order to avail himself of the carrier's breach of contract or of public duty. But where the carrier or his servant, by use of artifice or a false statement, induces such party not to persist in his attempt to be carried as a passenger, this, it would appear, does not in law amount to a refusal so as to render the carrier liable.¹ And it would appear that the party who is confronted by the refusal of the carrier or his servant to admit him, ought to exhibit his ticket if he has one, or tender the fare if it has not already been paid, as evidence of his right to be considered a full passenger, or one who is at all events ready to become one; though his obligation to do this might, to be sure, be somewhat affected by the manner and circumstances of the carrier's refusal.² Similar considerations apply to the case of a passenger's exclusion from the vehicle after he has entered it; which topic, however, we reserve for the next chapter.

If, from any cause, the transportation is prevented for which one has paid his passage-money in advance, he may, at all events, recover the money back as for a failure of the consideration which induced such payment.³ A company selling a ticket over another road not within its control must refund the money paid if acceptance of the ticket is refused, according to its proper terms;⁴ and should the conductor on its own

¹ See *Marshall v. Matson*, 15 L. T. N. S. 514, per Bramwell, B. But in this case it appeared doubtful whether such refusal would have been inexcusable. See c. 3, *post*.

² See *Commonwealth v. Power*, 7 Met. 596; *Harris v. Stevens*, 31 Vt. 79.

³ *Brown v. Harris*, 2 Gray, 359; *Cope v. Dodd*, 13 Penn. St. 33; 112 Ill. 295.

⁴ *Hudson v. Kansas Pacific R.*, 3 McCr. 249. Any holder of the ticket may sue, if the passenger, though not the original purchaser of the ticket.

road, through some mistake or default imputable to the carrier and his agents and not to the passenger, fail to honor a ticket which was duly bought and is duly presented, an action as for breach of contract will lie; or for tort with corresponding damages, if the passenger was put off the train, besides, or treated with other indignity.¹ But whether the passenger thus aggrieved sues in contract or tortwise, the full measure of his damages is the amount of fare demanded to carry him to his destination, where his own misbehavior invited his expulsion.² A breach of contract to transport on the carrier's part fairly entitles the passenger to go to his destination by the best available means and then recover damages sufficient to make him whole.³ Exemplary damages, however, are rarely given for mere breaches of this kind without open misconduct on the carrier's part; but the actual damages sustained, if any be shown, otherwise nominal damages.⁴

§ 637. **Legislation as to Fares and Duty to receive.**—6. Lastly, to speak of legislation concerning fares and the carrier's obligation to receive. Legislation may be found to regulate the matter of reasonable fares, as well as the number of persons to be taken in a particular vehicle for carriage. The safety and comfort of the travelling public require that passenger vessels, cars, stages, and other vehicles, transporting a large number of people at a time, shall not be overcrowded; and our license and inspection laws with especial

Ib. Otherwise, if the ticket was by its terms not transferable. 4 Sawyer, 114.

¹ *Palmer v. Railroad*, 3 S. C. 580. In *Philadelphia R. v. Rice*, 64 Md. 63, the passenger bought a round-trip ticket, and the first conductor by mistake punched the return coupon, and then rectified his error by an expedient which the returning conductor would not recognize. And see 88 Ind. 381.

² *Hall v. Memphis R.*, 15 Fed. R. 57.

³ See *The Zenobia*, Abb. Adm. 80, where one advanced half the passage-money to go by a vessel which sailed without him previous to the time appointed and without his knowledge, so that he had to take passage by a different vessel. And see next c.

⁴ *Goins v. Western R.*, 68 Ga. 190.

regard to water carriage usually aim, under penalties, to secure this as one of their most desirable objects.¹ Reasonable facilities for transportation are likewise demanded under various statutes;² independently of which the carrier who finds himself with more persons on hand entitled to transportation, who have already bought their tickets, than he can safely accommodate on the vehicle provided, ought at once to provide another for accommodating the overplus, or else stand to the damages he occasions by not transporting as he agreed to do.

With respect of fares, the English Railway and Canal Traffic Act 17 and 18 Vict. c. 31, and various special acts of that country applicable to railway and other conveyances, aim to establish equality and reasonableness of rates in passenger traffic as well as for the transportation of goods;³ and such carrier companies are not only forbidden to give any undue or unreasonable preference in favor of particular persons or companies, or to subject others to any undue or unreasonable prejudice or disadvantage in any respect, but are in various instances forbidden to charge at more than a specified tariff of rates for carrying passengers of different classes.⁴ Fares and tolls, too, are regulated by various local acts in the United States;⁵ and the right of penal action against the carrier for his extortionate or oppressive charges is sometimes given as affording ampler indemnity to the aggrieved

¹ See English Acts 2 & 3 Will. IV. c. 120; 2 & 3 Vict. c. 66, § 2; Fisher Harrison Dig. 1614, 1615 (Am. ed. 1879); U. S. Rev. Sts. §§ 4252-4289. Statutes are found requiring railways to furnish suitable cars, etc. 61 Wis. 596.

² Railway & Canal Traffic Act, 1854, 17 & 18 Vict. c. 31; Fisher Harrison Dig. 1615 (Am. ed. 1879).

³ See *supra*, §§ 484, 485.

⁴ See Acts 17 & 18 Vict. c. 31, § 2; 21 & 22 Vict. c. 75, § 1; Fisher Harrison Dig. 1615, 1618 (Am. ed. 1879); *Caterham v. London R.*, 1 C. B. N. S. 410. See also U. S. Inter-State Commerce Act (1887) in Appendix.

⁵ *Parker v. Metropolitan R.*, 109 Mass. 506.

party and better subserving the policy of government than an action in assumpsit as for money had and received, which has been paid under protest.¹ Nor is it deemed unconstitutional for a State legislature, under a reserved power to alter or amend the charter granted to a certain passenger-carrier company, to fix such fares or tolls.² But States have no right to impose oppressive and burdensome charges upon passengers under other pretexts; as, for instance, requiring "head-money" from ocean immigrants;³ and the regulation of commerce, inter-State or foreign, belongs to the United States.⁴

¹ See *Smith v. Chicago R.*, 43 Wis. 486. And see *Railroad Co. v. Fuller*, 17 Wall. 560; *Railroad Co. v. Richmond*, 19 Wall. 584.

² *Parker v. Metropolitan R.*, 109 Mass. 506.

³ *Henderson v. New York*, 92 U. S. 259; *Chy Lung v. Freeman*, 92 U. S. 275.

Act 8 Vict. c. 20, § 103, expressly provides for the case of travellers intending to evade the payment of their fares, making that fraudulent intention the gist and essential ingredient of the offence. *Dearden v. Townsend*, L. R. 1 Q. B. 10. And see *Barry v. Midland R.*, Irish Rep. 1 C. L. 130; *McCarthy v. Dublin R.*, Irish Rep. 3 C. L. 511; *Austin v. Great Western R.*, L. R. 2 Q. B. 442.

⁴ See *Passenger Cases*, 7 How. 283; *Inter-State Commerce Act* (1887) in Appendix.

CHAPTER II.

DUTIES AND RIGHTS INCIDENTAL TO THE JOURNEY.

§ 638. **General Duties of Carrier with Reference to the Journey.** — I. Before considering the liability of the passenger-carrier for injuring or killing a passenger he carries, let us dwell upon his general duties with reference to the journey.

The general duties of the passenger-carrier with reference to the journey comprehend the entire period from the acceptance of a particular passenger for transportation to safely bestowing him at the journey's end; and an injury to his person, such as calls for judicial intervention, may have reference to his breach of obligation at any intermediate point or at one of the termini.

§ 639. **The same Subject; Suitable Depot; Means of Ingress, etc.** — 1. The carrier ought to have a suitable depot or place for receiving passengers according to the usual custom of his profession; and in providing means, both of ingress to the car or vehicle, and egress therefrom, such as platforms, planks, gangways, and drops, there must be nothing improper, unusual, or carelessly constructed or adapted, whereby a passenger, using ordinary circumspection, is likely to be endangered.¹ The usual conveniences for entering and alighting

¹ Longmore v. Great Western R., 19 C. B. n. s. 183; Foulkes v. Metropolitan R., 4 C. P. D. 267; John v. Bacon, L. R. 5 C. P. 437; Le Baron v. East Boston Ferry Co., 11 Allen, 312; 37 La. Ann. 648, 694; Joy v. Winnisimmet Co., 114 Mass. 63. See Crafter v. Metropolitan R., L. R. 1 C. P. 300. But *quere* whether, for injuries done by a workman who is making repairs in the depot, the carrier is to respond personally. Welfare v. Brighton R., L. R. 4 Q. B. 693. As to insufficient lights, cf. 60 Miss. 442; 34 La. Ann. 777. To allow a hole to remain long

must be in place and kept in reasonably safe and good condition while used.¹ And in regulating the entrance and exit of trains or vehicles, and the departure and admission of passengers generally, such rules of precaution must be observed by the carrier as great prudence and a due regard for human safety may suggest.²

Reasonable regulations may be prescribed and enforced concerning the use of the passenger-depot by the general public; and this, whether we regard the carrier in this capacity or as the owner of the premises. Hackmen, inn-porters, newspaper-vendors, and others whose pursuit is disconnected with the duty which the carrier owes to his patrons, must

in the railway platform is negligence, 80 Ky. 82. And a railway permitting mail-bags to be thrown on a platform while the train is running at full speed is liable to one who is injured while waiting as passenger for his own train. *Snow v. Fitchburg R.*, 136 Mass. 552; *Carpenter v. Boston & Albany R.*, 97 N. Y. 494. See also c. 3, *post*, as to suitable modes of egress for a departing passenger.

Damage remotely connected with the carrier's own breach of duty, as where one while in a railway depot is bitten by a dog who happens to run in there, is not readily visited upon the carrier. *Smith v. Great Eastern R.*, L. R. 2 C. P. 4.

¹ *Foy v. London R.*, 18 C. B. N. s. 225. But cf. *Murch v. Concord R.*, 9 Fost. 9. And see, as to passenger-carriers by water, *Packet Co. v. Clough*, 20 Wall. 528; *Julien v. Steamer Wade Hampton*, 27 La. Ann. 377.

How far the carrier or his employés may be bound to assist passengers on board depends upon circumstances. *Allender v. Chicago R.*, 43 Iowa, 276.

A passenger is careless if he tries to get on board a railway train after it starts, according to *Paulitsch v. N. Y. Central R.*, 102 N. Y. 280 (three judges diss.). Cf. *Perry v. Central R.*, 66 Ga. 746. As to carelessly shutting the entrance gate on an elevated road, see 53 N. Y. Super. 91, 260.

² See *Martin v. Great Northern R.*, 16 C. B. 179; *Central R. v. Perry*, 58 Ga. 461; *Warren v. Fitchburg R.*, 8 Allen, 227; *Wheelock v. Boston & Albany R.*, 105 Mass. 203; *McDonald v. Chicago R.*, 26 Iowa, 124; *Knight v. Portland R.*, 56 Me. 234; *Angell Carriers*, § 521, 5th ed., Lathrop's note; *Chicago R. v. Dewey*, 26 Ill. 255. The carrier's duties in these respects are found chiefly asserted in the instance of railways. *Ib.*

comply with his rules of admission upon the premises, so as to annoy neither the carrier nor his passengers.¹ As to the passengers themselves, it may be both prudent and right to keep them in waiting-rooms excluded from the platform until the car or vehicle is ready to receive them. Into any railway station house, while it is kept open, the public have a general license to enter; but they must not misconduct there; and, moreover, this is a license revocable as to any and all persons who are neither officers nor employés of the company, nor have legitimate business there, growing out of the operation of the road. A person thus present must, upon request made by the company's agent in charge of the depot, explain satisfactorily his purpose in remaining there, or else leave the premises at once.² A passenger-carrier is not bound to receive his patrons into the depot unreasonably long before the journey is to commence, nor to permit even these to stay without first procuring the requisite tickets, if the means of procuring them be at hand.³ Persons unworthy of acceptance as passengers, and all riotous, turbulent, and disorderly characters ought to be kept out of such premises altogether; though if an improper party be once accepted as a passenger, the carrier cannot with freedom proceed to treat him as a trespasser or eject him, on the score of habitual misbehavior alone.⁴

¹ *Commonwealth v. Power*, 7 Met. 596.

² *Barker v. Midland R.*, 18 C. B. 46; *Harris v. Stevens*, 31 Vt. 79; *Commonwealth v. Power*, 7 Met. 601.

³ *Ib.* And see *Hall v. Power*, 12 Met. 482.

⁴ See *Commonwealth v. Power*, 7 Met. 596; *Hall v. Power*, 12 Met. 482. In *Commonwealth v. Power*, *supra*, p. 601, it is observed by Shaw, C. J.: "An owner of a steamboat or railroad, in this respect, is in a condition somewhat similar to that of an innkeeper, whose premises are open to all guests. Yet he is not only empowered, but he is bound, so to regulate his house, as well with regard to the peace and comfort of his guests, who there seek repose, as to the peace and quiet of the vicinity, as to repress and prohibit all disorderly conduct therein; and of course he has a right, and is bound, to exclude from his premises all disorderly persons, and all persons not conforming to regulations necessary and proper

§ 640. **Suitable Means and Appliances for the Transportation.**

— 2. The passenger-carrier is bound to have all means and appliances highly suitable to the transportation. There is here no undertaking implied that the vessel, car, or vehicle shall be, in all respects, perfect for its purpose, or, in other words, free from all defects likely to cause peril, such as the utmost skill, care, and foresight could not have detected. But seaworthiness or roadworthiness is here implied, as it would appear, to the extent of providing vehicles of suitable kind and condition, with all the skill, diligence, and foresight consistent with the nature and extent of the business.¹ Similar considerations apply to the other means connected with conveyance, as, for instance, to the horses and harness employed for travelling by hack or stage-coach;² or to the road-beds, switches, tracks, and other equipments of a modern railway;³ or to the rigging, small boats, smoke-stacks, and other usual articles and apparatus found upon steamboats or other vessels which carry passengers; or to the engines, fuel, water, and machinery for steam locomotion.⁴

to secure such quiet and good order." The station and means of ingress should be reasonably guarded against undue crowds and vicious and annoying persons; but an extra police, against unexpected dangers and annoyances, cannot be insisted on. See 77 Ala. 591; *Cannon v. Midland R.*, 6 L. R. Ir. 199.

¹ *Readhead v. Midland R.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Wright v. Midland R.*, L. R. 8 Ex. 137, 146; *Hyman v. Nye*, 6 Q. B. D. 685.

² *Bremner v. Williams*, 1 C. & P. 414; *Christie v. Griggs*, 2 Camp. 79; *Story Bailm.* §§ 592, 593; *Angell Carriers*, § 534; *Stokes v. Saltonstall*, 13 Pet. 181; *Peck v. Neil*, 3 McLean, 22; *Stockton v. Frey*, 4 Gill, 406; *Ingalls v. Bills*, 9 Met. 1; *Farish v. Reigle*, 11 Gratt. 697; *Fairchild v. California Stage Co.*, 13 Cal. 599; U. S. Dig. 1st Series, Carriers, 340. And see *Simson v. London Omnibus Co.*, L. R. 8 C. P. 390, where a kicking horse was not properly secured.

³ *Great Western R. v. Braid*, 1 Moore P. C. n. s. 101; *Readhead v. Midland R.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Taylor v. Grand Trunk R.*, 48 N. H. 304; *McElroy v. Nashua & Lowell R.*, 4 Cush. 400.

⁴ *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 361; *Swarthout*

Since there is no absolute warranty on his part against defects, the carrier of passengers cannot be blamed for an injury caused, without actual fault, by the breaking of an axle through some latent defect;¹ nor where a switch breaks through some defect that the most careful inspection would not have detected;² nor where, under like conditions, a rail breaks or becomes displaced;³ nor where the injury was caused by some malicious stranger, without any negligence of the carrier;⁴ nor, of course, where *vis major*, like a severe frost, or violent storm or flood, occasions the breaking or displacing in question; and the accident was through no fault of the carrier.⁵

§ 641. **The same Subject.** — But the existence of the latent defect presupposes that the carrier has faithfully performed his duty of inspection. According to some authorities, examination ought to be made previous to each journey;⁶ but this statement was made with reference to horse and stage conveyance; and prevailing custom and the mode of conveyance may have much to do with determining the method and

v. New Jersey Steamboat Co., 48 N. Y. 209; *Carroll v. Staten Island R.*, 58 N. Y. 126.

¹ *Readhead v. Midland R.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Ingalls v. Bills*, 9 Met. 1, a leading authority, where the question is carefully discussed by Hubbard, J. Contrary to this view is the New York case of *Alden v. New York Central R.*, 26 N. Y. 102; since, however, fairly repudiated in *McPadden v. New York Central R.*, 44 N. Y. 478. And see *Hegeman v. Western R.*, 3 Kern. 9.

² *Ladd v. New Bedford R.*, 119 Mass. 412.

³ *Taylor v. Grand Trunk R.*, 48 N. H. 304; *Pittsburgh R. v. Williams*, 74 Ind. 462.

⁴ *Deyo v. N. Y. Central R.*, 34 N. Y. 9.

⁵ *McPadden v. New York Central R.*, 44 N. Y. 278; *Frink v. Potter*, 17 Ill. 406; *Ellet v. St. Louis R.*, 76 Mo. 518. Otherwise, *semble*, if the engineer had reason to suspect the danger and omitted due precautions. 76 Mo. 518. Or if there was fair opportunity to inspect properly and apply safeguards or avoid undue exposure after *vis major* operated, so that the carrier's own knowledge charged him. *Louisville R. v. Thompson (Ind.)*, 8 N. E. 18.

⁶ *Story Bailm.* § 592. And see *Sharp v. Grey*, 9 Bing. 457.

frequency of such inspection in modern transportation, where that examination which the utmost diligence, prudence, and foresight should exact must needs be by different agents and at different times and places. Official inspectors are provided for vessels, upon whose certificate the carrier ought to be allowed to place some reliance, irrespective of examination by his own agents. In railway travelling an intermediate inspection of the cars is often made at way-stations; but such examination is necessarily hasty, if the train is to proceed on due time, and in justice it can hardly be a minute one;¹ other more general modes of careful inspection, however, as to tracks, bridges, road-beds, and rolling stock should be scrupulously observed.

As to the carrier's duty of adopting new inventions and improvements, every new and possible preventive against accident need not be taken. Thus it has been held, in the case of a ferry, that the company is not bound, as a matter of law, to provide a new and expensive "drop," although other companies use such a contrivance.² But for using defective carriages and appliances the passenger-carrier is held responsible, irrespective of their manufacture or ownership; and, as a rule, he must discard whatever is insecure or ill-adapted to the times, and, so far as the general duty of extreme care on his part requires, keep pace with science and modern improvements.³ Nor can the want of pecuniary means justify the carrier's negligence in this respect; for when he cannot afford to transport passengers after the standard the law demands for their safety, he should rather cease transporting them altogether.⁴

¹ See *Richardson v. Great Eastern R.*, 1 C. P. D. 342, reversing s. c. L. R. 10 C. P. 486.

² *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *Meier v. Penn. R.*, 61 Penn. St. 225.

³ *Ib.*; *Hegeman v. Western R.*, 3 Kern. 9; *St. Louis R. v. Valirius*, 56 Ind. 511; 27 Fed. R. 724.

⁴ See *Taylor v. Grand Trunk R.*, 48 N. H. 304.

§ 642. **Suitable Provision for Safety and Comfort in Transportation.** — 3. The passenger-carrier is bound to transport with reasonable provision for the safety, comfort, and security of the passengers. Many of the considerations which were adduced with respect to the conveyance of goods will here apply.¹ That the passenger should be provided with a place is a rule duly enforced, as we have shown, though with more especial reference to those who carry a long distance.² But while the passenger ought to take his proper place, and not sit where it would be unsafe to travel, the carrier is not freed from responsibility for exercising due care towards one who occupies an unusual, but not ordinarily an unsafe place;³ and, as to unsafe places, the carrier should not knowingly permit the passenger to ride there at all.⁴

In loading the car, vessel, or other vehicle, the passenger-carrier must dispose his passengers so as to promote their reasonable comfort and safety; and under no circumstances is he permitted to overload either with passengers or their baggage, for this invites danger.⁵

Where a long continuous transportation is by land, accommodation for regular meals and refreshment should be provided the passengers, which duty is usually fulfilled by stopping a reasonable time at convenient stations; though saloon and refreshment cars are sometimes attached to railway trains.⁶ In water transportation, where the means of stopping are not convenient, passengers ought, on any transit

¹ *Supra*, §§ 401-404.

² *Supra*, § 623.

³ *Keith v. Pinkham*, 43 Me. 501.

⁴ But the passenger's own carelessness might defeat his action against the carrier, as will presently be seen.

⁵ *Story Bailm.* § 594; *Aston v. Heaven*, 2 Esp. 533; *Farish v. Reigle*, 11 Gratt. 697; *Derwort v. Loomer*, 21 Conn. 246. Statutes which specially regulate and limit the number of passengers to be taken on board a vessel cannot be disregarded with impunity. See *Story Bailm.* § 612; *U. S. Rev. Sts.* §§ 4252-4289; *supra*, § 637.

⁶ *Peniston v. Chicago R.*, 34 La. Ann. 777.

of length, to have the means of procuring meals on board.¹ Accommodations for sleeping, too, should, in this latter case, be provided; and one who travels by night on a steamer without paying specially for a state-room may properly expect a berth.²

§ 643. **The same Subject; Maintaining Order on Board.** — The carrier of passengers is bound to exercise the utmost vigilance and care in maintaining order, and guarding the passengers against violence, from whatsoever source arising, which might reasonably be anticipated or expected in view of the number and character of the persons on board and all the other attendant circumstances of the transportation.³ Hence, if a company of soldiers be received on board a steamship, even though Government has in a measure compelled their conveyance, the safety of other passengers accepted in the ordinary course by the carrier must be respected with exceeding solicitude.⁴ Disorderly scuffles, scandalous and immoral conduct, fights, brawls, personal insult and annoyance, and all wanton disregard of reasonable rules of transportation which are designed to promote the general comfort and security, must be firmly repressed by the carrier and his servants, who should not be wanting in great vigilance and care to prevent disturbance.⁵ And, that the carrier's servants need not be over-timorous in enforcing the rules of decency and good order, it is but fair to hold that a person who is so far

¹ *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146; *Bryant v. Rich*, 106 Mass. 180. But these accommodations are subject to reasonable rules; and, as for meals, officers of the vessel may have their own table apart from passengers. *Ellis v. Narragansett Steamship Co.*, 111 Mass. 146. The master of a vessel has no right to put a passenger on short allowance by way of some petty discipline. *Abb. Adm.* 242.

² *The Oriflamme*, 3 Sawyer (U. S.), 397.

³ See *Shipman, J.*, in *Flint v. Norwich Trans. Co.*, 6 Blatchf. 158; s. c. 34 Conn. 554; *Norwich Trans. Co. v. Flint*, 13 Wall. 3.

⁴ *Ib.* Cf. *McClenaghan v. Brock*, 5 Rich. 17.

⁵ *New Orleans R. v. Burke*, 53 Miss. 200; *White v. McDonough*, 3 Sawyer, 311; 22 Fed. R. 413; 23 Fed. R. 637.

intoxicated that, by act or speech, he is becoming decidedly offensive or annoying to other persons, may be expelled from the car or vehicle, even before he has actually assaulted or insulted any one; provided this be done with as much humanity and consideration as the circumstances permit.¹ Misbehavior, indeed, or insanity, or loathsome disease, may be manifested in an impersonal manner, so as to annoy, discommode, or endanger the safety of other passengers, without being directed against a particular individual; though we are not to suppose that one regularly accepted as a passenger can be expelled merely for previous misbehavior.² But in general, the carrier's liability for disorderly outbreaks or other dangerous exposure of an unusual kind depends greatly upon his means of anticipating and guarding against the consequences.³

So, if the passenger-carrier was overpowered by a crowd, too great and coming too suddenly for the usual precautions to suffice against them, he should not be responsible for his inability to repress disturbance and violence among them; since no passenger-carrier is bound to provide a police force against

¹ See *Vinton v. Middlesex R.*, 11 Allen, 304, where such expulsion was held justifiable in the instance of a journey upon a street railway. And see *Murphy v. Union R.*, 118 Mass. 228; *Railroad v. Valleley*, 32 Ohio St. 345; 1 Mackey (D. C.), 180.

Yet, on this point of dealing with drunken men, *Putnam v. Broadway R.*, 55 N. Y. 108, holds that a street-car conductor is not bound to eject an intoxicated passenger who addresses insulting remarks to his fellow-passengers, provided he remains quiet and inoffensive after being admonished by the conductor. Any conductor may disarm and confine a passenger who is dangerous while in delirium tremens. 22 Fed. R. 413. Or may have him expelled and handed over to the public authorities. *Atchison R. v. Weber*, 33 Kan. 543.

If a passenger on shipboard proves to have small-pox or other infectious disease, it is right for the captain to isolate him, having due regard to the patient's comfort and welfare. 10 Ben. 512.

² See Mr. Justice Davis in *Pearson v. Duane*, 4 Wall. 605; *Coppin v. Braithwaite*, 8 Jur. 875; *supra*, §§ 623, 625.

³ *Felton v. Chicago R.*, 29 N. W. 618.

such unexpected emergencies. But a lack of vigilance in admitting such persons, or of prudence and bravery in dealing with them, ought not to be manifested on his part to the detriment and danger of other passengers; and where a railway-conductor, after admitting such persons, leaves them in a car to riot and annoy, and proceeds on the journey, going into another part of the train, when he might prudently switch the car off or stop the train and have the offenders summarily dealt with, the carrier cannot expect to stand exonerated.¹ Nor is a carrier justified in disregarding dangers against which he was amply warned, and in failing to protect his patrons accordingly. The conductor of a railway-train or captain of a steamboat should be the conservator of order and good morals; and the appeal of an aggrieved passenger for protection against the violence or annoyance of others on board ought not to go unheeded.²

§ 644. **The same Subject; Good Treatment by Carrier's Servants.**—Nor is it only good treatment from fellow-passengers and from strangers coming upon the car, vessel, or vehicle that each passenger is entitled to, but he should be well treated by the passenger-carrier himself and all whom such carrier employs in and about the vehicle in the course of the journey. If the general doctrine of master and servant may be said to apply here, it applies with a very strong bias against the master, even where the servant's acts appear to be aggressive, wanton, malicious, and, so to speak, such as one's

¹ *Pittsburg R. v. Hinds*, 53 Penn. St. 512. See *Weeks v. New York Central R.*, 72 N. Y. 50. And, as to street-railways, see *Holly v. Atlanta Street R. (Ga.)*, 7 Rep. 460.

² *New Orleans R. v. Burke*, 53 Miss. 200; 4 Mackey, 111; *Pittsburg R. v. Pillow*, 76 Penn. St. 510. See *Putnam v. Broadway R.*, 55 N. Y. 108. Where a passenger is in danger of assault, the conductor should either try to protect him where he is or have him go where he will be secure. 88 N. C. 536. As to the carrier's duty in carrying "non-union" workmen and others at the peril of having the train mobbed, see *Chicago R. v. Pillsbury (Ill.)*, 8 N. E. 803.

strict contract of service or agency does not readily imply.¹ Such is the general construction, so long as the offensive words and acts of a conductor, brakeman, porter, steward, waiter, or other such servant complained of, were said or committed in the usual line of duty; while, for instance, scrutinizing tickets and determining the right to travel, excluding offenders and trespassers, and enforcing, or pretending to enforce, the carrier's rules aboard the vehicle; and this, whether the transportation of passengers be by land or water.² If the carrier knowingly retains the servant who is guilty of misconduct towards the passenger, all the more clearly does he, by his sanction, make the wrongful act his own.³ Yet, in some extreme instances of wanton injury by the carrier's servant, the usual doctrine of agency or service has been maintained, that, for wrongful acts committed beyond the scope of employment, the servant is as much a stranger to the carrier as any third person.⁴

The carrier's servants ought to be trustworthy, capable, and skilled in the performance of the several duties assigned

¹ See the able opinion in *Pendleton v. Kinsley*, 3 Cliff. 416, per Mr. Justice Clifford, and cases cited; *Gasway v. Atlanta R.*, 58 Ga. 216; *Angell Carriers*, 5th ed. § 572, and Lathrop's note.

² *Moore v. Metropolitan R.*, L. R. 8 Q. B. 36; *Bayley v. Manchester R.*, L. R. 7 C. P. 415; L. R. 8 C. P. 148; *Pendleton v. Kinsley*, 3 Cliff. 416, the case of a transportation by water; *Goddard v. Grand Trunk R.*, 57 Me. 202; *Hanson v. European R.*, 62 Me. 83; *McKinley v. Chicago R.*, 41 Iowa, 314; *Sherley v. Billings*, 8 Bush, 147; *Moore v. Fitchburg R.*, 4 Gray, 465; *Passenger R. v. Young*, 21 Ohio St. 518; *Bryant v. Rich*, 106 Mass. 180, where the aggressors on a steamboat were the steward and table-waiters; *Jackson v. Second Avenue R.*, 47 N. Y. 274.

³ *Gasway v. Atlanta R.*, 58 Ga. 216; *Goddard v. Grand Trunk R.*, 57 Me. 202.

⁴ *Little Miami R. v. Wetmore*, 19 Ohio St. 110; *Isaacs v. Third Avenue R.*, 47 N. Y. 122, where a street-railway conductor pushed a lady passenger off the car while the car was in motion. But, even thus, on ordinary principle, the master, as it seems, must not have contributed to the injury by his own culpable negligence or misconduct. See *supra*, §§ 19, 30, 108.

them. Thus, only careful drivers of reasonable skill and good habits should be employed in journeying by stage-coach or hack;¹ while those who drive on horse-railways ought to understand the peculiar modes of guiding animals in such conveyances, and keep alert in stopping to take and leave passengers; and these considerations apply likewise to an omnibus-driver. Engineers, conductors, switchmen, brakemen, and all others employed in railway locomotion, must be competent for their several duties; on board a vessel, the officers and crew must each understand well the duties of his post; and all responsible employés should be temperate and sound-minded while on duty.² In general the passenger-carrier is bound by the acts of his servants and subordinates in the course of their employment, as for his own, and must answer for their negligent or unskillful performance; and this, whether the carrier be a person or a corporation.³

§ 645. **The same Subject; Care in Conducting the Transportation.** — There are certain duties to be observed on the road and in the course of active carriage which no carrier who performs with a just sense of his public obligations can afford to neglect. These vary, of course, with the nature of the journey and the means of transportation. A coachman or hackman, for instance, must handle his reins well, and guide his

¹ *Stokes v. Saltonstall*, 13 Pet. 181; *Tuller v. Talbot*, 23 Ill. 357; *Frink v. Coe*, 4 Greene (Iowa), 555; *Story Bailm.* § 593; *Sawyer v. Dulany*, 30 Tex. 479; *Stockton v. Frey*, 4 Gill, 406; *Farish v. Reigle*, 11 Gratt. 697; *Angell Carriers*, §§ 540, 541.

² *Angell Carriers*, §§ 540, 541.

³ See *Story Bailm.* § 596; *Angell Carriers*, 5th ed. §§ 572-579, and *Lathrop's notes*; *Tebbutt v. Bristol R.*, L. R. 6 Q. B. 73; *Waland v. Elkins*, 1 Stark. 272; *Stockton v. Frey*, 4 Gill, 406.

For negligence and misconduct the master, as well as the owners of a vessel, may be held responsible. *White v. McDonough*, 3 Sawyer, 311.

One partner in such carriage may likewise, on the usual doctrine of partnership, be held liable for the negligence of another. Many of our earlier cases relating to stage partnerships, which are now somewhat obsolete, are set out at length in *Angell Carriers*, §§ 580-589.

animals skilfully, obey the rules of the road, turn out for other vehicles, give due warning of dangerous obstacles, pursue his journey at a fair pace without racing or driving rapidly over dark and dangerous places, use lights by night, and, in short, exercise at all times a sound and reasonable discretion to avoid dangers and difficulties.¹ The rules of the road are quite commonly regulated by statute; in America, each party is expected to bear or keep to the right in meeting, while it is said to be the reverse in England; and one who drives must look out not to run down foot-passengers who are crossing the highway.² These rules yield somewhat to circumstances, and come in aid of that coolness and good judgment which for safe driving are always indispensable.³

The carriage of passengers by steam involves the employment of various special precautions against accident. On a railway the tracks must be kept clear and in safe condition; switches must be in good order and properly adjusted; a system of signals must be established, especially at intersecting tracks, which the engineer and those in charge are bound to regard; the progress of approaching trains must be watched, and any disarrangement of time-tables, through obstruction or otherwise, noted, in order that collision may be avoided; signals of danger must be prescribed and used in time of need; the whistle, the bell, the head-lights, the brakes, must be in good order and well managed; engineers, firemen, and brakemen, as well as the conductor, must be each at his post; railway crossings must be watched, and their gates or guards suitably constructed; nor must animals or obstructions be

¹ *Crofts v. Waterhouse*, 3 Bing. 321; *Wordsworth v. Willan*, 5 Esp. 273; *Story Bailm.* § 598, and cases cited; *Farish v. Reigle*, 11 Gratt. 697; *Laing v. Colder*, 8 Penn. St. 479; *McKinney v. Neil*, 1 McLean, 540; *Nashville R. v. Messino*, 1 Sneed, 220; *Stokes v. Saltonstall*, 13 Pet. 181; *Angell Carriers*, §§ 543-547; *Dudley v. Smith*, 1 Camp. 167.

² *Story Bailm.* §§ 599, 599 *a*; *Kennard v. Burton*, 25 Me. 39.

³ *Ib.* And see *Angell Carriers*, §§ 549-556; *Lovejoy v. Dolan*, 10 Cush. 495.

run over heedlessly, nor broken tracks or dangerous places be jumped, nor the train be recklessly driven, whereby those on board receive injury.¹ In these and various other kindred respects the carrier is bound, according to custom and prevailing modes of business, to exert the utmost practicable care, diligence, and foresight; and it is the same, whether the object be to provide against the negligence and misconduct of the company's servants, or the negligence and misconduct of any stranger.²

§ 646. **The same Subject.**— Passenger-carriers by water must observe the usual rules which admiralty or legislation has promulgated. Thus, in order to lessen the dangers of collision, certain rules of navigation are established, which cannot be transgressed without rendering the offending vessel strictly liable for all disastrous consequences. These rules, which relate chiefly to the use of lights and fog signals in dark and foul weather, and to the method of steering and the precautions needful for observance when approaching other vessels, may be fully studied in general works on admiralty and shipping.³ There is a law of the road, so to speak, on the ocean highway, which sailing-vessels and steamers must observe reciprocally and with reference to others of their own denomination.⁴ Canal-boats, and ferries, too, and boats or small craft, engaged in inland or coasting transportation of

¹ *Buxton v. North-Eastern R.*, L. R. 3 Q. B. 549; *McElroy v. Nashua & Lowell R.*, 4 Cush. 400; *Tyrrell v. Eastern R.*, 111 Mass. 546; *Sullivan v. Philadelphia R.*, 30 Penn. St. 234.

² See *Gray, J.*, in *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 368; *Pittsburg R. v. Hinds*, 53 Penn. St. 512; *Eaton v. Boston & Lowell R.*, 11 Allen, 500.

³ *Story Bailm.* §§ 605-612, and cases cited; 1 *Pars. Shipp.* 548; *Maude & Poll. Shipp.* 3d ed. 449-465; *The Galatea*, 92 U. S. Supr. 439; 25 & 26 *Vict. c.* 63, and *Orders in Council*, Jan. 9, 1863; U. S. *Rev. Sts.* § 4233; *Angell Carriers*, 5th ed. §§ 633-670.

⁴ *Story Bailm.* § 611 *b.*, and cases cited; *The Carroll*, 8 Wall. 302; *The City of Brooklyn*, 1 P. D. 276; *The Sea Gull*, 23 Wall. 165; *The Free State*, 91 U. S. 200.

freight or passengers, may be found subjected to wholesome requirements of a similar character.¹ In all instances of public carriage by water, the general principles of legal responsibility are those applicable to land-carriers, with only such modifications as naturally result from employing a different and peculiar means of transportation.²

§ 647. **The same Subject.**—The powerful agency of steam in transportation calls for the employment of engineers skilful and well trained in its use, — a class of men whose service in driving our modern railway-trains demands, in other respects, quite a high order of intelligence, besides steady habits and a courageous disposition. Steam and the use of steam machinery for propelling vessels invite special danger to passengers, which the inspection acts of Congress aim in a measure to avert. Where, because of the carrier's remissness, or his disregard of such legislation, injury occurs, whether it be through the use of improper machinery and boilers, or reckless or unskilful management, so that scalding steam escapes, or the boiler bursts, the carrier should strictly respond;³ and, in general, carriers who use steam should use the utmost care and diligence to avert personal injury from this cause.⁴

Precautions needful for the more important methods of

¹ See *Farnsworth v. Groot*, 6 Cow. 698; *Story Bailm.* § 606; *Angell Carriers*, §§ 630, 637.

² In case of collision caused by the fault of one vessel, the modern English and American rule renders the owners of the offending vessel liable to the extent of their interest in the ship and freight. *Walker v. Transportation Co.*, 3 Wall. 150; *Story Bailm.* § 608 *d*; *The Atlas*, 93 U. S. Supr. Ct., per Mr. Justice Clifford; U. S. Rev. Sts. §§ 4281–4289. The prevailing tendency, too, is, in England, to relieve ship-owners from liability for collisions which occur without fault or privity on their part; as in case the pilot is solely to blame. *The Obey*, L. R. 1 Add. & Ecc. 102; *The Velasquez*, L. R. 1 P. C. 494. See *The Merrimac*, 14 Wall. 199.

³ *Carroll v. Staten Island R.*, 58 N. Y. 126; U. S. Rev. Sts. §§ 4399–4500; *Angell Carriers*, § 629; *Steamboat New World v. King*, 16 How. 469.

⁴ See *Philadelphia R. v. Derby*, 14 How. 482, 486.

transit are frequently prescribed by statute, and must be followed accordingly, or the carrier will be culpably negligent. But, as it has been well observed, compliance with positive statute regulations does not exempt the carrier from responsibility for neglect to observe all other reasonable precautions.¹ Thus, the inspection of the boiler and machinery of a passenger-steamer, and the certificate of the inspector that they fulfil the requirements imposed by act of Congress, do not, of themselves, impair the common-law right of action by persons injured through the carrier's negligent or unskilful management.² Nor does it sufficiently exonerate a railway carrier from liability for injury caused at a railway crossing, that a sign was put up and the bell rung, as an act of legislation required.³ As to the rate of speed, the carrier may fix this for himself, provided that the risks of the travelling public be not unduly increased.⁴

§ 648. **Duty to carry without Unreasonable Deviation or Delay.** — 4. The passenger-carrier is bound to proceed to the place of destination by the agreed or customary route without unreasonable deviation or delay. Hence, in the place and time of starting, modern railway companies, steamers, and other leading classes of carriers are bound by their published schedules and time-tables;⁵ these, and their posters and advertisements generally, being in the nature of a public offer which patrons and passengers are understood to accept.⁶

¹ *Simmons v. New Bedford Steamboat Co.*, 97 Mass. 368, per Gray, J.

² *Swarthout v. New Jersey Steamboat Co.*, 48 N. Y. 209.

³ *Bradley v. Boston & Maine R.*, 2 Cush. 539; *Carpue v. London R.*, 5 Q. B. 747; *Angell Carriers*, § 540; *Galena R. v. Loomis*, 13 Ill. 548; *Payne v. Chicago R.*, 41 Iowa, 236. See *Augusta R. v. McElmurry*, 24 Ga. 75.

⁴ *Indianapolis R. v. Hall*, 106 Ill. 371.

⁵ *Hobbs v. London R.*, L.R. 10 Q. B. 111; *Denton v. Great Northern R.*, 5 E. & B. 860; *Angell Carriers*, § 527 *a*; *Sears v. Eastern R.*, 14 Allen, 433; *Le Blanche v. London R.*, 1 C. P. D. 286. As to deviation by a stage-driver, see *McKinney v. Neil*, 1 McLean, 540.

⁶ *Heirn v. M'Caughan*, 32 Miss. 17.

There may likewise be special representations of this character to bind the carrier to an individual passenger as by a special undertaking.¹ And so momentous becomes this duty, both with reference to enabling a passenger to save time and meet his own engagements at his journey's end, and (as concerns particular modes of transportation) for guarding against collision and disaster on the way, that certain classes of carriers, railway companies more especially, are liable to suits for damages, if they do not run according to their official time-tables. The duty applies with reference both to going over the whole route within the prescribed time, and making intermediate stops for the purpose of putting off or taking aboard passengers at specified times and specified way places.² Upon large transporters of passengers, like railway companies, there appears, in fact, to rest a public duty of giving some sort of public notice of the running times; which duty is commensurate with supplying such needful information that travellers of ordinary intelligence may, by reasonable care and caution, conform themselves to its terms.³

§ 649. **The same Subject; Published Time-Tables, etc.** — The publication of time-tables indicates, however, no more than a reasonable conformity thereto and reasonable diligence, subject to those possible casualties and mishaps against which ordinary skill and prudence on the carrier's part are unavailing.⁴ Nor is the case an unusual one where delay or devia-

¹ *Hobbs v. London R.*, and other cases *supra*.

² *Hobbs v. London R.*, L. R. 10 Q. B. 111; *Heirn v. M'Caughan*, 32 Miss. 17; *Chicago R. v. George*, 19 Ill. 510.

³ See *Page v. New York Central R.*, 6 Duer, 523; *Barker v. New York Central R.*, 24 N. Y. 599; 8 E. L. & Eq. 362.

⁴ *Le Blanche v. London R.*, 1 C. P. D. 286; *Gordon v. Manchester R.*, 52 N. H. 97; *McClary v. Sioux City R.*, 3 Neb. 44; *Savannah R. v. Bonaud*, 58 Ga. 180. In the matter of running precisely on time, courts incline to be lenient to the carrier, unless disaster appears plainly due to his fault in this respect. *Artz v. Chicago R.*, 44 Iowa, 284; *Campbell v. Chicago R.*, 45 Iowa, 76; *State v. Philadelphia R.*, 47 Md. 76.

tion would be excusable and highly proper: the main concern being to transport at all events with sedulous regard to life and limb; and one disarrangement, excusable of itself, involving many delays, particularly where the transportation, as by railway, is upon fixed tracks and attended with peculiar dangers and difficulties.

Further than this, it is to be understood that the published time-table may be changed by the carrier upon giving reasonable notice; and knowledge of this change, brought actually home to a party in advance of his becoming a passenger, ought, in general, to bind him. But, in order to make the change safely as to the public, such change of time should be as publicly made as the original announcement; and hence a railway schedule, published without open limitation or reservation as to the length of time it shall continue in force, is insufficiently changed by mere hand-bills to that effect posted in the depot and cars.¹

We are to note, also, that a carrier's undertaking to run at a certain time is not usually to be inferred from tickets or the language of a ticket-agent, but rather from time-tables and a public schedule.² Nor is the mere statement, by the carrier or his servant, of the usual time required for running through, an absolute promise to carry the person through in that time.³

§ 650. **The same Subject; Passenger's Remedies for Breach of Duty.** — Upon the failure to start or run the conveyance according to the carrier's undertaking is founded the passenger's action to recover such damages as he may have sustained in consequence, so far as the damage be the natural and justly fore-

¹ *Sears v. Eastern R.*, 14 Allen, 433. Usage to this effect, though pursued by the company several years, cannot justify this practice. *Ib.* That general restrictive notices by a carrier are not favored in this country by way of establishing special contracts, see *supra*, § 627.

² *Hurst v. Great Western R.*, 19 C. B. N. S. 310; *Pittsburgh R. v. Nuzum*, 50 Ind. 141. See *Chicago R. v. George*, 19 Ill. 510.

³ *Strohn v. Detroit R.*, 23 Wis. 126.

seen consequences of the carrier's breach of contract.¹ Under strong circumstances, the passenger suffering by the carrier's unreasonable detention and violation of duty may choose another conveyance, or even, upon notice of his grievance, when a railway passenger, engage a special train to carry him through; but this concession of the law appears to be upon the suggestion that, where the carrier fails to do of his own motion what he was bound to do, the passenger may do it for him at his cost;² and the passenger as a rule should simply go by the best available means to his destination. It is certainly more natural and just for the carrier, when a contingency arises where his own vehicle or car is found unable to perform the transit with due despatch and facility, to make his own transfer of the passengers, in order that his contract be performed towards them with as little loss to himself as may consist with justice to their interests; otherwise, at discretion, to proceed himself to the journey's end, with no more delay or deviation than he can reasonably help.³ A collision or injury occasioned proximately by running in disregard of time-tables renders the carrier liable for his negligence.⁴

¹ *Denton v. Great Northern R.*, 5 E. & B. 860; *Hobbs v. London R.*, L. R. 10 Q. B. 111; *Hamlin v. Great Northern R.*, 1 H. & N. 408; *Sears v. Eastern R.*, 14 Allen, 433; *Thompson v. New Orleans R.*, 50 Miss. 315. And see *The Zenobia*, Abb. Adm. 80.

² See *Le Blanche v. London R.*, 1 C. P. D. 286.

³ *Williams v. Vanderbilt*, 28 N. Y. 217. As to a common carrier's justifiable deviation and delay, and the duty of "transshipment," see, generally, *supra*, §§ 377, 408.

⁴ *Chicago R. v. George*, 19 Ill. 510.

The obligations we have considered apply to the carrier who contracts on behalf of himself and connecting carriers to send the passenger through to a given destination; and for damages resulting from the non-performance or negligent performance of connecting carriers as to time, place, methods, and facilities, the passenger who has purchased his ticket under such an agreement may sue accordingly. *Supra*, §§ 615-617; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Carter v. Peck*, 4 Sneed, 203; *Van Buskirk v. Roberts*, 31 N. Y. 661.

It is tortious for a passenger-carrier to carry off the passenger's bag-

§ 651. **Carrier's Duty as to Changes, Way-Stations, etc.** — A passenger-carrier ought to have changes of conveyance and the names of way-stations so made known to passengers, by audible announcement or otherwise, and make such reasonable stops, that way passengers may change, or get off and on, according to their respective rights in the premises.¹ But the carrier may prescribe and enforce reasonable rules to protect his interests against permitting passengers to get carelessly on or off, or to stop over.² Nor is a railway carrier bound to put off or take on passengers, except at the regular stations.³ Passengers for more distant points have no right to get off and on the vehicle at intermediate stations; but the universal and convenient practice of permitting this as to coaches, railways, and steamers is not illegal, especially if the stop be a considerable one; and the carrier ought to have his facilities suitable, and give such reasonable notice before starting again, that the passenger, if not actually delinquent, may resume his proper place.⁴

§ 652. **Carrier's Liability for injuring a Passenger.** — II. Now, to consider the liability of a passenger-carrier for injuring or killing a passenger he carries. Our examination of the carrier's duties with reference to the journey indicates that, while the law may not be perfectly explicit, the standard of liability is set very high, — not so high as that of the common

gage against his assent, while deliberately refusing to carry the passenger himself, according to contract. *Holmes v. Doane*, 3 Gray, 328.

¹ *Fuller v. Naugatuck R.*, 21 Conn. 558; *Story Bailn.* § 597; *Penn. Railroad v. Kilgore*, 32 Penn. St. 292; *Southern R. v. Kendrick*, 40 Miss. 374; *Barker v. New York Central R.*, 24 N. Y. 599; *Thompson v. New Orleans R.*, 50 Miss. 315; *Toledo R. v. Baddeley*, 54 Ill. 19. See next c.

² See *Breen v. Texas R.*, 50 Tex. 43. If transfers are made, the carrier undertaking to transport through should pay due regard to supplying whatever transfer checks or tickets may be needful. 70 Ga. 368.

³ *Pittsburgh R. v. Nuzum*, 50 Ind. 141.

⁴ *State v. Grand Trunk R.*, 58 Me. 176; *Keokuk Packet Co. v. True*, 88 Ill. 608.

carrier of goods, who by the common law is reckoned an insurer, except for act of God, act of public enemy, and act of customer or of public authority; nor yet so low as that of ordinary bailees of goods for hire; but (if resembling any bailee of chattels at all) most nearly analogous to that of a bailor for his sole benefit, who must answer for what is termed a "slight negligence."¹ Carriers of passengers do not warrant the safety of passengers, but they are held to the highest degree of practicable care under the circumstances presented; and to this standard a philanthropic age must adhere.² On the whole, the present liability, which is fixed by public policy from considerations of humanity which can neither be wholly established nor wholly restrained by special contract, and for which the payment of fare does not constitute the consideration of safe transportation in any such sense as to exclude the law's protection of all who journey, may be in general defined as follows: The carrier of passengers must use the utmost forethought, care, and diligence towards the human beings travelling under his charge, consistently with the nature and extent of the business he pursues; and for the injurious consequences of even slight neglect on the part of himself or his servants, he is, in this sense, liable, though not as one whose vocation imports a warrant of absolute safety, or of indemnity against those disasters which the exercise of due forethought, care, and diligence on his part fails to avert.³ And as for the personal damage which ensues to the passen-

¹ *Supra*, §§ 15, 72.

² See ruling objected to as too strong in 141 Mass. 31, and 76 Mo. 282; and as not strong enough in 6 Q. B. D. 685.

³ This statement, with its limitations, is supported by most of the authorities already cited, *passim*, in the course of this chapter. See, more particularly, *Ingalls v. Bills*, 9 Met. 1; *Readhead v. Midland R.*, L. R. 2 Q. B. 412; L. R. 4 Q. B. 379; *Philadelphia & Reading R. v. Derby*, 14 How. 468; *Steamboat New World v. King*, 16 How. 469; *Keokuk Packet Co. v. True*, 88 Ill. 608. And see *Story Bailm.* §§ 596, 601; *Waland v. Elkins*, 1 Stark. 272; *Stockton v. Frey*, 4 Gill, 406; *Clark v. Eighth Avenue R.*, 36 N. Y. 135.

ger from wanton, malicious, and wrongful misbehavior on the part of the carrier, the carrier must strictly respond, if personally at fault; and generally, too, if the wrong were that of a carrier's servant acting in the course and scope of employment.¹ In all such cases the question is one of proximate and direct cause of injury.

Where the injury in question was proximately occasioned by act of God or the public enemy,² or even by accident and misfortune in the lesser sense above implied, and without his own fault, the carrier is certainly absolved from liability. And reason and common justice demonstrate, too, that the carrier is exonerated when the proximate and moving cause of the injury was the act of the injured passenger himself; since the rule is general that no one can charge another in damages for negligently injuring him, where he himself failed to exercise due and reasonable care in the premises.³ But

¹ *Supra*, § 644. See, more particularly, *Pendleton v. Kinsley*, 3 Cliff. 416; *Gasway v. Atlanta R.*, 58 Ga. 216; 4 McCr. 371. Evidence that one deported himself as conductor or brakeman, etc., may justify the conclusion that he was such. (Ark.) 2 S. W. 783.

² See *Sawyer v. Hannibal R.*, 37 Mo. 240; *Story Bailm.* § 602; *McPadden v. New York Central R.*, 44 N. Y. 278. As in the sudden weakening of the track by a violent storm or freshet. *Ellet v. St. Louis R.*, 76 Mo. 518. Or where a bridge gives way under like circumstances and before there is opportunity to guard against consequences. (Ind.) 8 N. E. 18; *supra*, §§ 640, 641.

³ *Gee v. Metropolitan R.*, L. R. 8 Q. B. 161; *Todd v. Old Colony R.*, 7 Allen, 207; *Railroad Co. v. Aspell*, 23 Penn. St. 147; *Pittsburg R. v. McClurg*, 56 Penn. St. 294; *Wheelock v. Boston & Albany R.*, 105 Mass. 203; *Higgins v. Hannibal R.*, 36 Mo. 418.

The application of this doctrine occasions some very nice distinctions in our later cases. 1. Thus, one who rides upon a train, or in a car, or upon the part of a vehicle, where, as a passenger, he is not duly in place, has been allowed to recover for an injury there sustained; this, however, usually upon a state of facts showing some or all of such circumstances as, that it was a place which, *per se*, is not dangerous or unusual for passengers, or that the conductor or other person in charge silently or expressly permitted the person to stay, knowing he was there, or that the action of the passenger only remotely occasioned the injury, or that the carrier's negligence was gross as compared with his own. See

due and reasonable care on the passenger's part need not be expressly and positively proved; for the law will infer it

Jacobus v. St. Paul R., 20 Minn. 125; *Caldwell v. Murphy*, 1 Duer, 233; *Spooner v. Brooklyn City R.*, 54 N. Y. 230; *Creed v. Penn. R.*, 86 Penn. St. 139; *Dunn v. Grand Trunk R.*, 58 Me. 187; *Lucas v. Milwaukee R.*, 33 Wis. 41; *Meesel v. Lynn R.*, 8 Allen, 234, as to riding on the platform of a horse-car; *Spofford v. Harlow*, 3 Allen, 176; *Angell Carriers*, 5th ed. § 559 and Lathrop's note. But where a party rides upon a caboose solely used for other purposes, or a locomotive, or travels in some other plainly dangerous place, not intended for passengers at all, the inclination is against permitting the injured party to recover; more especially if he is a trespasser and no passenger; or if the company's proper official sanction was never given to riding in such a place; or if the injury be directly traceable to exposing one's self to the peculiar hazards of such a place. See *supra*, § 621; *Eaton v. Delaware R.*, 57 N. Y. 382; *Union Pacific R. v. Nichols*, 8 Kans. 505. Where the conductor had no knowledge and gave no consent, it cannot be contended that he ought to have discovered and ordered the passenger out. *Kentucky Central R. v. Thomas*, 79 Ky. 160. Nor is a station agent the proper person to give such authority to ride, apart from those in charge of the train. *Little Rock v. Miles*, 40 Ark. 298. Carriers should, however, be especially careful not to knowingly permit young children to ride in dangerous places. See *Brennan v. Fair Haven R.*, 45 Conn. 284. As to distinguishing between paying and non-paying passengers in this respect, see *post*. Generally speaking, a passenger who might ride in a less dangerous place cannot excuse himself for riding where it is far more dangerous, on the plea that he had no seat. 99 Penn. St. 492.

2. As to projecting one's head, arm, or body out of a car window, or doing other imprudent acts. It would be a passenger's own fault if he kept his arm thrust clear out of a railway car window; for there is always danger from quickly passing trains and obstructions of various kinds on a railway; the same in a lesser degree might be apprehended in any inland conveyance moving too rapidly for due warning of approaching objects. Injuries thus occasioned are due to the passenger's own negligence. And in some cases the slightest voluntary projection of one's arm, head, or elbow out of the car window is deemed careless so as to defeat the right of recovery. *Pittsburg R. v. Andrews*, 39 Md. 329; *Todd v. Old Colony R.*, 3 Allen, 18; 7 Allen, 207; *Pittsburg R. v. McClurg*, 56 Penn. St. 294; *Louisville R. v. Sickings*, 5 Bush, 1, and cases cited. And see as to upper compartment of a street-car (*Md.*), 5 Atl. 346. But in others, as light projection of this sort is not taken to be conclusive against the passenger. For the duty of the carrier to journey sufficiently clear of all such obstacles, and construct and locate his tracks, buildings, bridges, and cars accordingly, is deemed paramount; so that his failure in these respects

where there is no appearance of fault, either positive or negative, on his part, in the circumstances under which the injury was received.¹ And it would appear that, if the carrier substantially cause the disaster by his own fault, a slight aberration or confusion of mind on the part of the passenger at the instant of peril ought not to be turned to the advantage

would be negligence so proximate or so gross in comparison with that of the passenger as not to defeat the latter's right to recover. See *Barton v. St. Louis R.*, 52 Mo. 253; *Chicago R. v. Pondrom*, 51 Ill. 333; *New Jersey R. v. Kennard*, 21 Penn. St. 203; overruled in *Pittsburg R. v. McClurg*, *supra*. And it must, of course, be admitted, that an obstruction so close as to crash in the window, or break the car, or otherwise damage one sitting with his elbow, head, and person inside, imputes no carelessness to the passenger, but rather puts the onus upon the carrier.

3. In moving about the vehicle, passing from one car into another, shutting windows or doors, or trying to regulate matters for his own comfort, the passenger might, by his carelessness, exonerate the carrier from liability. *Adams v. Lancashire R.*, L. R. 4 C. P. 739. But on the other hand, if the carrier's fastenings be insecure, and the passenger's act not an unreasonable one, the blame of the accident should fairly rest upon the carrier. *Gee v. Metropolitan R.*, L. R. 8 Q. B. 161. And see *Louisville R. v. Kelly*, 92 Ind. 371, where a passenger was jostled carelessly by a brakeman, while going into a forward car to find a seat as the conductor had directed.

4. Intoxication of the passenger, contributing to his injury, may debar him from recovering against the carrier. But intoxication which does not contribute to the injury will not prevent him from maintaining his action. *Maguire v. Middlesex R.*, 115 Mass. 239.

5. Carelessly trying to get off or on a moving train or vehicle is another obstacle to recovery by the injured passenger. *Perry v. Central R.*, 66 Ga. 746; 67 Ga. 306; *Mitchell v. Chicago R.*, 51 Mich. 236; 75 Mo. 185, 475; 102 N. Y. 280. And in walking on a station platform, along the tracks or the pier, the passenger is bound to ordinary prudence. 20 S. C. 219.

Intentional fraud in travelling on a ticket which the passenger had no right to use is held to debar one from recovering for personal injury sustained, if the carrier was not grossly at fault. *Toledo R. v. Beggs*, 85 Ill. 80. But cf. *Louisville R. v. Thompson* (Ind.), 9 N. E. 357. As to furnishing surgeons of ordinary skill, etc., where injury occurs, see 18 Fed. R. 221.

¹ *Mayo v. Boston & Maine R.*, 104 Mass. 137; *Steves v. Oswego R.*, 18 N. Y. 422. But see *Deyo v. New York Central R.*, 34 N. Y. 9.

of the real offender, so as to relieve him of responsibility for the calamity.¹

§ 653. **The same Subject; Burden of Proof, etc.**—It has long been usual to assert the rule regarding the *onus probandi* quite strongly against the carrier, by way of favoring the right of passengers who are damaged or injured in the course of transportation.² But later cases incline to put it more impartially; and, according to the better opinion, the presumption of culpable default in the carrier arises only when the passenger appears to have been injured because of a defect in the vehicle or the machinery, apparatus, equipments, and appliances used, including the track of a railway and the locomotive power, or by a want of due foresight, care, or diligence in those employed, or by any other thing with reference to himself or third parties, which the carrier can and ought to control as part of his duty to carry the passengers safely;³ or where actual misconduct of the carrier or his servants,

¹ This doctrine is applied as between colliding vessels. *The Carroll*, 8 Wall. 302; *The Falcon*, 19 Wall. 75. Nor is leaping from a stage or other vehicle at the critical moment of danger visited harshly upon a passenger; though to so leap or get on or off the vehicle merely to avoid being carried beyond his stopping-place, or other lesser reason, might not be excusable. *Stokes v. Saltonstall*, 13 Pet. 181; *South-Western R. v. Paulk*, 24 Ga. 356; *Frink v. Potter*, 17 Ill. 406; *Angell Carriers*, § 547; *Caswell v. Boston & Worcester R.*, 98 Mass. 194; *Damont v. New Orleans R.*, 9 La. Ann. 441. Cf. *Railroad Co. v. Aspell*, 23 Penn. St. 147; *Nelson v. Atlantic R.*, 68 Mo. 593, and other cases cited, *post*, § 662.

As to the responsible carrier or carriers thus liable to suit, see *supra*, §§ 615–619. And see, as to injury sustained in a sleeping-car, *Cleveland R. v. Walrath*, 38 Ohio St. 461. For the rule of damages see § 664, *post*.

² *Story Bailm.* § 601 *a*, and cases cited; *Christie v. Griggs*, 2 Camp. 79; *Stokes v. Saltonstall*, 13 Pet. 181; *Ware v. Gay*, 11 Pick. 106; *Carpue v. London R.*, 5 Q. B. 747; 95 N. Y. 562.

³ *Daniel v. Metropolitan R.*, L. R. 3 C. P. 216; *Bovill, C. J.*, in *Simson v. London Omnibus Co.*, L. R. 8 C. P. 390; *Story Bailm.* § 601 *a*, and note, 9th ed.; *Meier v. Pennsylvania R.*, 64 Penn. St. 225, per *Agnew, J.*, where this rule is very clearly stated; *Colt, J.*, in *Feital v. Middlesex R.*, 109 Mass. 398; *Curtis v. Rochester R.*, 18 N. Y. 534; *Pittsburg R. v. Pillow*, 76 Penn. St. 510.

within the limits already noticed, is manifested.¹ Even thus the presumption is not conclusive; but the carrier may rebut it, and relieve himself by showing that the injury arose from some accident or misfortune which the utmost skill, foresight, and diligence could not prevent; or, perhaps, that the actual misconduct of a so-called servant was such as ought not to charge the carrier personally.²

§ 654. **Carrier's Liability for causing Death.** — As for causing the passenger's death, passenger-carriers seem not to have been, at the common law, liable to an action; for the theory of the common law is, that the right to sue for a personal injury is personal to the party receiving it, and that the death of one human being cannot be complained of as an injury to another. Hence, the personal representative, surviving husband or widow, or next of kin, could formerly maintain no such action;³ nor, even though the local statute permitted actions for personal injury to survive, did this avail where the death was instantaneous, so that the injured party died without a right of personal action.⁴ But modern legislation in England and America corrects this hardship by supplying a remedy which proves salutary both for relieving the distressed family and keeping the carrier to the due performance

¹ See *Readhead v. Midland R.*, L. R. 2 Q. B. 412; *L. R. 4 Q. B. 379*; *Meier v. Pennsylvania R.*, 64 Penn. St. 225; *Welfare v. London R.*, L. R. 4 Q. B. 693; *Hegeman v. Western R.*, 3 Kern. 9; *Ingalls v. Bills*, 9 Met. 1; *McPadden v. New York Central R.*, 44 N. Y. 478; *Le Barron v. East Boston Ferry Co.*, 11 Allen, 312; *Farish v. Reigle*, 11 Gratt. 697. Where the facts are undisputed, the question of proximate cause is for the court. 76 Mo. 288.

² See *Little Miami R. v. Wetmore*, 19 Ohio St. 110; *Isaacs v. Third Avenue R.*, 47 N. Y. 122; *supra*, § 644.

³ *Carey v. Berkshire R.*, 1 Cush. 475; *Conn. Mut. Life Ins. Co. v. New York, &c. R.*, 25 Conn. 265; *Hubgh v. New Orleans R.*, 6 La. Ann. 495; *Eden v. Lexington R.*, 14 B. Mon. 201; *Metcalf, J.*, in *Palfrey v. Portland R.*, 4 Allen, 56.

⁴ *Shaw, C. J.*, in *Kearney v. Boston & Worcester R.*, 9 Cush. 108. But if the person lives after the accident, though remaining insensible, the action survives. *Bancroft v. Boston, &c. R.*, 11 Allen, 34.

of his duty. The inclination of these statutes appears to be to set apart the amount of damages recoverable, as a fund for the exclusive benefit of those entitled in case of intestacy, without regard to the will of the deceased;¹ and the amount of damages recoverable is limited usually to a sum fixed, but otherwise liberally awarded at the discretion of the jury.²

§ 655. **Whether Special Contract affects Liability for Injury, etc.** — III. Whether special contract and special circumstances may diminish the passenger-carrier's liability for the personal safety of those he conveys. The point is somewhat novel in its present application; but, upon the whole, there seems a disinclination in the courts, particularly those of America, to permitting the carrier to regulate his momentous responsibility for life and limb at pleasure, however it might

¹ Railroad Co. v. Barron, 5 Wall. 90; Chicago R. v. Morris, 26 Ill. 400.

² Railroad Co. v. Barron, 5 Wall. 90; Railway Co. v. Whitton, 13 Wall. 270. See South Carolina R. v. Nix, 68 Ga. 572, where it was doubtful by which of two trains the passenger was killed.

A novel question has been raised in England, but is not yet fully answered, whether one action cannot be brought, under such a statute, to recover as for the injury caused the widow, next of kin, etc., by the death of the party; and another for damage to the personal estate of deceased, as for medical bills, loss of business, etc. Judgment and satisfaction in the former suit is held not to bar the latter suit; but, as to granting the additional damages, *quære*. See Leggott v. Great Northern R., 1 Q. B. D. 599; questioning Bradshaw v. Lancashire R., L. R. 10 C. P. 189. And see Angell Carriers, §§ 593-601.

But the injured person's accord and satisfaction for the injury during his life-time bars the statute action on behalf of widow, kindred, etc., though he should die of the injury afterwards. Read v. Great Eastern R., L. R. 3 Q. B. 555. Nor can personal representatives sue, where the deceased, had he survived, would not have been entitled to recover. Haigh v. Packet Co., 52 L. J. 640; § 656, *post*.

The action sometimes directed by statutes for causing death is prosecuted in the form of an indictment against the carrier; and here the same general principles of law and evidence are applicable as in civil actions for damages. See State v. Grand Trunk R., 58 Me. 176; Commonwealth v. Metropolitan R., 107 Mass. 236.

be with reducing his common-law liability for general freight or a passenger's baggage. Public policy is less flexible and yielding, where it comes to fixing the terms of human conveyance, than it appeared when only senseless goods and chattels were concerned; nor can it be affirmed, as a general proposition, that the carriage of passengers may, by the most explicit understanding between the public transporter and his customer, be brought down even so slightly as to leave the former analogous, in legal responsibility, to an ordinary bailee for hire.

§ 656. **The same Subject; Travellers on Free Pass, etc. —**

This issue is chiefly raised in the late decisions respecting "drovers' passes," where persons are taken free in charge of the animals they wish transported, and upon railway trains which are naturally better adapted for the freight than their living owners. Here appears a marked distinction between the English and American cases, upon much the same difference of bias. In England it is decided, but in the lower tribunals only, that any person who travels on a drover's pass in charge of animals travels at his own risk of personal safety; this on the supposition that the passenger-carrier may, by special contract, divest himself of liability;¹ and in that country even paying passengers have been subjected to like conditions embodied in the tickets they purchase.² The same rule as to drovers has been announced, too, in New York; though at a period when corresponding stipulations for the carriage of goods were more favored than they have been of late years.³ The inference is, that any passenger who travels free on a

¹ *McCawley v. Furness R.*, L. R. 8 Q. B. 57; *Gallin v. London R.*, L. R. 10 Q. B. 212.

² Even, *semble*, though the effect be to put the risk of life and limb upon the passenger, despite the carrier's negligence. *Haigh v. Packet Co.*, 52 L. J. 640, the case of a steamship passenger.

³ *Bissell v. New York Central R.*, 25 N. Y. 442. See also *Poucher v. New York Central R.*, 49 N. Y. 263, where the facts were quite exceptional.

special understanding, as evinced by his ticket or otherwise, that he assumes all risks of injury to his person, relieves the carrier of liability accordingly ; and thus, in fact, has it been decided in New York and New Jersey.¹

But the safer rule, and that which a broader appreciation of the public welfare seems to favor, is to the contrary ; and the best-supported American doctrine, which is fortified by the powerful sanction of the Supreme Court of the United States, views all these distinctions between free and paying passengers as unsound. According to this view of the carrier's liability there is an obligation imposed by public law which is superior to and independent of all private agreement ; and whether it be upon a drover's pass, or any other free or limited ticket, whether upon expressed terms of restriction or otherwise, the carrier cannot shield himself from the consequences of his negligence ; but towards all passengers the utmost care and diligence must be used, and the standard of duty must be according to the consequences that might ensue from carelessness.²

¹ *Kinney v. Central R.*, 32 N. J. 407 ; *Wells v. New York Central R.*, 24 N. Y. 181. Both of these are railway cases. *Aliter*, in New York, as to government mail-agents. *Seybolt v. N. Y. R.*, 95 N. Y. 562. And see *Betts v. Farmers' Loan Co.*, 21 Wis. 80, where the rule, however, is applied to damaged animals rather than the drover who accompanied them. In Connecticut the same rule is applied. 51 Conn. 143 ; *Griswold v. N. Y. R.*, 53 Conn. 371.

² See *Indianapolis R. v. Horst*, 93 U. S. 291 ; *Railroad Co. v. Lockwood*, 17 Wall. 357, where there is an exhaustive review of the "special-contract" cases relative to a carrier's liability ; *Pennsylvania R. v. Henderson*, 51 Penn. St. 315 ; *Cleveland R. v. Curran*, 19 Ohio St. 1 ; 17 Fed. R. 671 ; *Ohio R. v. Nickless*, 71 Ind. 271 ; 40 Ark. 298 ; 14 W. Va. 180. These cases relate to "drovers' passes." As to more general cases of gratuitous transportation, see *Philadelphia R. v. Derby*, 14 How. 468 ; *Steamboat New World v. King*, 16 How. 469 ; *Todd v. Old Colony R.*, 3 Allen, 18 ; *Pennsylvania R. v. Butler*, 57 Penn. St. 335 ; *Great Northern R. v. Harrison*, 10 Ex. 376 ; *Graham v. Pacific R.*, 66 Mo. 536. And see *Ohio & Mississippi R. v. Muhling*, 30 Ill. 9 ; *Austin v. Great Western R.*, L. R. 2 Q. B. 442, per Cockburn, C. J. ; *Story Bailm.* § 590, 9th ed., and note.

§ 657. **Full Liability where no Special Exemption was stipulated.** — We conclude that, at all events, where nothing special is stipulated to the contrary, one who is lawfully carried, even though he rides free, and who is not a mere trespasser, is entitled to recover damages if injured by the carrier's negligence.¹ And an ordinary passenger, who pays the regular fare without deduction, ought not to be denied his legal rights on any mere inference that he has waived them; while it is certain that no such waiver can be extorted from him as the condition of his carriage.² We need hardly repeat, however, that where one rides, without the carrier's knowledge and assent, in unusual and unsafe places, or travels whether by abuse of his own pass or fraudulently on another ticket, so as to evade fare and not be in the just sense a passenger, his right of action, or at least his recovery of damages as for injury by the carrier, is likely to be defeated.³

§ 658. **Carrier's Right of Ejection.** — IV. In pursuance of his rights, and his general duty as well, the passenger-carrier, or his representative, may eject from the car or vehicle persons on board who wrongfully refuse to pay their fares, or who misbehave and violate wholesome regulations for promoting the general comfort and security of those on board;

¹ *Ib.* And see *Packet Co. v. Clough*, 20 Wall. 528; *Wilton v. Middlesex R.*, 107 Mass. 108; *Rose v. Des Moines Valley R.*, 39 Iowa, 246; *Brennan v. Fair Haven R.*, 45 Conn. 284; *Robertson v. New York R.*, 22 Barb. 91; *Blair v. Erie R.*, 66 N. Y. 313; *Nashville R. v. Messino*, 1 Sneed, 220.

That which purports to be a free pass may be nevertheless given for consideration; in which respect one might show himself not estopped by the special terms of his ticket. *Railway Co. v. Stevens*, 95 U. S. 655.

² See *Elliott v. Western R.*, 58 Ga. 454. One travelling for a considerable distance is presumed rightfully on board. (*Ind.*) 8 N. E. 18. A drover travelling by railway on a free pass is in effect a passenger for hire. *Supra*, § 620. At all events, he is not to be concluded by a contract which the owner of animals signs after the accident. 64 Wis. 447.

³ *Supra*, §§ 620, 621.

or who are mere intruders, having no right on board.¹ But, with respect more particularly to those once accepted as pas-

¹ For the usual circumstances under which such ejection is proper, see *supra*, §§ 625, 643. And see *Chicago R. v. Flagg*, 43 Ill. 364; *Vinton v. Middlesex R.*, 11 Allen, 304; *Breen v. Texas & Pacific R.*, 50 Tex. 43; *Angell Carriers*, 5th ed. § 609, and Lathrop's note; *O'Brien v. Boston & Worcester R.*, 15 Gray, 20. One who is properly expelled for refusing to pay fare does not regain the right to re-enter by tendering it. See *State v. Campbell*, 32 N. J. 309; *Hibbard v. New York R.*, 15 N. Y. 455. Nor to renew his ride by simply purchasing a ticket onward from the station at which he was ejected, his back fare not having been paid. *Swan v. Manchester R.*, 132 Mass. 116. Whether if the train has been specially stopped to put him off, he can retain a right to remain by then offering his fare, see *Cincinnati R. v. Skillman*, 39 Ohio St. 444; *contra*, *South Carolina R. v. Nix*, 68 Ga. 572. But the better authorities among the latest are averse to needless ejection for mere non-payment of fare; and hold that where a fractions passenger by rail tenders his fare before actual ejection, changing his mind at the last moment, or where some one else offers to pay the fare for him, the conductor has no right to refuse it and to eject him. *O'Brien v. N. Y. Central R.*, 80 N. Y. 236; *South Carolina R. v. Nix*, *supra*; 18 Fed. R. 155; *Texas R. v. Bond*, 62 Tex. 442; *Pease v. Delaware R.*, 101 N. Y. 367. This at all events, where the train was stopped at a regular station, and others were not inconvenienced by some stoppage for the sole purpose of ejection, and the right to remain was not forfeited by such passenger's own wilful abuse and misbehavior. Cf. 15 Fed. R. 57, where the passenger wrangled, and so misbehaved as to invite ejection. Nor has the carrier the right to accept one's fare or take up his ticket and then eject him for non-payment of proper fare; nor even to eject the passenger, and then return the money or ticket to him; but he should return the money or ticket before ejecting at all. *Supra*, § 633; *Bland v. Southern Pacific R.*, 55 Cal. 570. A passenger may be expelled for refusing to pay the fare of a minor under his charge, though paying his own fare. 62 Md. 300. As to expelling the child, see (Mass.) 8 N. E. 875. Even though passage might be refused in an improper place, unnecessary violence is not excusable. 72 Ga. 292. But allowance should be made for any one who appears a *bona fide* passenger with his proper fare, whose age, ignorance, disability, or other good cause prevents a prompt compliance with the conductor's demand. 14 Lea, 128; 91 N. C. 506.

That the carrier may with far more freedom expel those who endanger the safety and comfort of other passengers by outrageous conduct, intoxication, infectious disease, etc., see *supra*, §§ 643, 644. Here expulsion is for the general benefit of those who are travelling, while as to mere non-payment only the carrier and the particular passenger are interested.

sengers, this dangerous discretion must be prudently exercised. Where the issue relates merely to one's proper fare and the passenger is not violent and abusive, the conductor should allow him every opportunity to pay or explain before resorting to harsh measures; nor at any time should the carrier fail in judgment and forbearance or eject for his own revenge and to gratify an ill temper. And, in general, the carrier or his representative should not needlessly abuse the person ejected, in language or acts; nor subject him to wanton indignity; nor use more force than is needful; nor eject him at such a place or in such a manner as carelessly or wantonly to endanger him in life or limb;¹ nor, of course, eject without good cause.

Where the conductor of a train, captain of a steamboat, or other representative of the passenger-carrier, who is charged with enforcing the rules and resorting to this disagreeable extremity, abuses his authority in any such respect, the carrier himself may commonly be held answerable in damages to the person aggrieved;² while the servant is liable to criminal

¹ *Coleman v. New York R.*, 106 Mass. 160; *State v. Ross*, 2 Dutch. 224; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23. Ejection while a railway train is in motion would be dangerous; but as to a horse-railroad, such ejection appears not so positively dangerous. Cf. *Sanford v. Eighth Avenue R.*, 23 N. Y. 343; *Murphy v. Union R.*, 118 Mass. 228; 67 Ga. 306. But as to proximate cause of injury, see *Railroad Co. v. Valleley*, 7 Reporter, 406. Legislation sometimes forbids the ejection of railway passengers, in certain instances, except at regular stations. See 29 Vt. 160; 43 Ill. 420; 45 Ark. 524. But the common-law rule does not treat this as always essential. *Ib.*; *McClure v. Philadelphia R.*, 34 Md. 532.

² See *supra*, § 644; *Moore v. Metropolitan R.*, L. R. 8 Q. B. 36; *Jennings v. Great Northern R.*, L. R. 1 Q. B. 7; *Elliott v. Western R.*, 58 Ga. 454; *Stephen v. Smith*, 29 Vt. 160; *Hanson v. European R.*, 62 Me. 84; *Atlantic & Great Western R. v. Dunn*, 19 Ohio St. 162; *Townsend v. N. Y. Central R.*, 56 N. Y. 295; *Passenger R. v. Young*, 21 Ohio St. 518; *Jackson v. Second Avenue R.*, 47 N. Y. 274. If the conductor orders a passenger to leave the train while it is in motion, the company cannot set up in defence the passenger's negligence in obeying so improper an order.

prosecution besides.¹ A wrongful ejectment may be resisted and wrongful passage-money refused; and the fact that the passenger aggrieved does resist will not prevent him from recovering damages against the carrier.²

Southwestern R. v. Singleton, 67 Ga. 306. For an instance of outrageous and threatening conduct by a conductor, see 4 McCr. 371.

Arrest of a passenger is by local statute permitted in certain cases, besides ejectment. (Mass.) 8 N. E. 875; (Tenn.) 1 S. W. 280. A brakeman or other employé of the carrier may be shown to be the usual agent for ejecting, so as to bind the carrier. St. Louis R. v. Hendricks (Ark.), 2 S. W. 783.

¹ State v. Ross, 2 Dutch. 224.

² English v. Delaware Canal Co., 66 N. Y. 454; Hufford v. Grand Rapids R., 53 Mich. 118.

CHAPTER III.

TERMINATION OF THE JOURNEY.

§ 659. **How One's Journey may prematurely end.** — As we have already seen, a passenger's journey may terminate prematurely in his ejection or expulsion from the car, vessel, or other vehicle; ¹ or perhaps in some personal accident or misfortune; ² in either of which events the law and facts must decide whether carrier or passenger should bear the loss.

§ 660. **Journey naturally ends at Place of Destination; where to stop.** — But in the natural course, the journey properly terminates, so that the carrier shall discharge himself of responsibility, when the place is reached to which he undertook to make conveyance, and the passenger is properly landed there, unless, indeed, the passenger has chosen to stop short of such destination, and leave the vehicle. Custom and mutual agreement must determine what this place shall be; whether, as in the instance of a hackney coachman, at the passenger's own door; or, again, where the carriage is by omnibus or street-car, at such place on the route as the passenger shall elect; or, once more, to take the case by far the most familiar of all, at the station, depot, or landing-place where the rail-car, steamboat, or other vehicle makes its usual stop to leave passengers.³ The undertaking may have been to leave the passenger at the end of the carrier's route; or at some way-place; or perhaps to send him through to some point by means of carriers performing in succession; or, once more, so as to leave him to his own choice. But,

¹ *Supra*, § 658.

² *Supra*, §§ 652-654

³ See Story Bailm. § 600

whatever the undertaking, express or implied, to this, in its just intent, the carrier and his passenger remain mutually bound; subject, of course, to mutual waiver and a right for cause to consider the obligation on either side as sooner rescinded.¹ And the common understanding is that the passenger shall be carried through, not only safely and securely, as to life and limb (under the conditions already dilated upon), but without unreasonable delay and according to the usual or the prescribed means.²

The usual or the prescribed place of stopping cannot be varied at the will of the carrier, even for prudential reasons, for the contract obligation is upon him; though, if full performance be prevented by some overpowering cause, the circumstances might not be disregarded. Thus, an English stage-driver has been required to land his passenger in the inn-yard, and not outside the gateway;³ and a railway train ought commonly to discharge at the station, and not along the line at a point beyond or short of it.⁴

§ 661. **Opportunity to alight; Proper Landing-Place, etc.** — At the proper station or landing-place for his passengers, the carrier should give time and a fair opportunity for all to alight; and to this end the vehicle should come to a full stop and so remain while the landing goes on. To manage such landing so that passengers cannot safely get on or off is negligence. Under some circumstances the name of the place should be announced.⁵ Calling out the station is in effect an

¹ See *Ker v. Mountain*, 1 Esp. 27. A carrier need not stop except at regular stopping-places, unless expressly contracting to do so. *Plott v. Chicago R.*, 63 Wis. 511. *Aliter*, where reasonable rules or the contract with the passenger obliges the carrier to do so. *Hull v. East Line R. (Tex.)*, 2 S. W. 831.

² *Supra*, § 648.

³ *Dudley v. Smith*, 1 Camp. 167.

⁴ *New Orleans R. v. Hurst*, 36 Miss. 660; *Southern R. v. Kendrick*, 40 Miss. 374. And see, as to a carrier by steamboat, *Porter v. Steamboat New England*, 17 Mo. 290.

⁵ A carrier is not liable in damages for carrying a sick and drowsy

invitation to alight,¹ though not so as to dispense with average heed and intelligence on the passenger's part.² Reasonable arrangements, too, should be made to enable passengers to leave the carrier's premises in safety; thus, railways should have suitable platforms in proper condition, and of proper construction, and keep its tracks clear; steamships should have good gangway-planks, securely placed;³ and, in general, lights should be shown to dispel darkness and guide the passenger, where his footing would otherwise be insecure, and the utmost care taken not to invite or mislead those alighting into places where they are likely to be injured.⁴ In short, for the carrier's failure to use very great precaution and care at the point of disembarking, he may be regarded answerable, either on the general ground of his negligence, or because his contract to carry through safely has not yet been discharged.⁵

§ 662. **Passenger's Duty in Landing.** — So, too, is the passenger bound to use the arrangements thus duly provided for him, and be ordinarily careful in getting out and away from the station or landing-place, for he cannot hold the carrier

passenger past his destination, though the conductor promised as a favor to wake him up and failed to do so. *Sevier v. Vicksburg R.*, 61 Miss. 8; *Nunn v. Georgia R.*, 71 Ga. 710. Conductors, with their more responsible duties, cannot be expected to charge their minds with concerns of this sort. *Ib.*

¹ *Railroad Co. v. Garcia* (Tex.), 19 Rep. 153.

² *Mitchell v. Chicago R.*, 51 Mich. 236.

³ See *Heirn v. McCaughan*, 32 Miss. 17; 35 Hun, 590; *John v. Bacon*, L. R. 5 C. P. 437; *Packet Co. v. Clough*, 20 Wall. 528; 49 Mich. 370.

⁴ *Bridges v. North London R.*, L. R. 7 H. L. 213; *Foy v. London R.*, 18 C. B. n. s. 225; *Weller v. London R.*, L. R. 9 C. P. 126; *Hobbs v. London R.*, L. R. 10 Q. B. 111; *Vicksburg R. v. Howe*, 52 Miss. 202. See *supra*, § 651, as to the carrier's duty when he lands passengers at a way-station. See also *supra*, § 639, as to suitable modes of ingress where one goes on board.

⁵ *John v. Bacon*, L. R. 5 C. P. 437; *Keokuk Packet Co. v. True*, 88 Ill. 608. One may remain a passenger while leaving the station or landing-place. (*Mass*) 7 N. E. 874.

liable for an injury otherwise. Thus, a railway passenger is not justified in jumping from the train while it is in motion, even though the carrier was negligent, whether in carrying him past the station or in starting before he had due opportunity to land; ¹ if he alight knowingly on the opposite side of the track instead of at the platform, he risks the consequences; ² for a departing passenger in general should exercise ordinary prudence both in landing and in leaving the station.³

§ 663. **Final Compensation, Surrender of Ticket, etc.** —The compensation of a passenger-carrier is rarely deferred to the completion of his undertaking; but it is customary on long routes, as part of our modern system, not to take tickets up until at or near the journey's end; the passenger being bound, meantime, not only to show the voucher of his right to travel whenever required, but to finally surrender it at the proper time.⁴ And where, as is quite customary on steamboats, the passenger is not asked to produce his ticket at all until the vehicle reaches its landing, he ought to have it ready to surrender before he passes out.⁵ When one of choice goes beyond the station named in his ticket he must expect to pay additional fare.⁶

If one cannot produce his ticket, as they are thus being

¹ *Nelson v. Atlantic R.*, 68 Mo. 593; *Railroad Co. v. Aspell*, 23 Penn. St. 117; 9 La. Ann. 411; *Lucas v. New Bedford R.*, 6 Gray, 61; *Straus v. Kansas City R.*, 75 Mo. 185.

² *Pennsylvania R. v. Zebe*, 37 Penn. St. 420. See also *Lewis v. London R.*, L. R. 9 Q. B. 66; *Robson v. North-Eastern R.*, L. R. 10 Q. B. 271; *Siner v. Great Western R.*, L. R. 3 Ex. 150; L. R. 4 Ex. 117. It is not negligence *per se* to leave a railway car by the rear. (*Mich.*) 18 N. W. 381.

³ The adjustment of blame in such cases is often difficult. See *Renueker v. South Carolina R.*, 20 S. C. 219; *Brassell v. N. Y. Central R.*, 81 N. Y. 241; 75 Mo. 475; *Keefe v. Boston R. (Mass.)*, 7 N. E. 874; 5 Atl. 814, and cases cited.

⁴ *Supra*, § 625.

⁵ *Standish v. Narragansett Steamship Co.*, 111 Mass. 512.

⁶ *Great Western R. v. Pocock*, 41 L. T. 415.

collected while passengers leave the vehicle, he has no right to keep others waiting, or divert the attention of the ticket-taker; but the carrier may properly make him step aside and wait long enough for a reasonable inquiry to be made into the circumstances.¹ If the passenger cannot then justify the non-production of his ticket, the amount of his fare may be demanded on the spot.² Needless violence towards the passenger would, however, be unjustifiable on the usual principles; and whatever the statute which might justify calling a policeman and handing a cheat over to justice, to be dealt with as a criminal, the carrier cannot imprison a party on his vehicle for non-payment of his fare, nor even seize his articles of wearing-apparel or personal use for the purpose of compelling satisfaction.³

§ 664. **Remedies of Passenger in General; Damages.**—The action of the passenger against his carrier is usually based upon some one or more of the grievances we have already sufficiently considered. Where the party offering himself is unjustly refused transportation, he should sue in case, as for violation of the carrier's public duty; or for breach of contract at discretion if his ticket is dishonored by the carrier.⁴ Where, however, after being once accepted, he is injured in person or unlawfully expelled, the grievance may be viewed as a tort, generally but not always to be sued upon in case, or as a breach of contract for carriage, where the action should be laid in assumpsit.⁵ The distinctions in practice between the two forms of action have already been treated in the

¹ *Standish v. Narragansett Steamship Co.*, 111 Mass. 512.

² *Ib*

³ *Runsden v. Boston & Albany R.*, 104 Mass. 117. But doubtless the carrier may detain baggage left in his own custody for the unpaid fare lawfully due him from the owner. See next c.

⁴ *Supra*, § 636, and cases cited; *Heirn v. McCaughan*, 32 Miss. 17.

⁵ *Angell Carriers*, §§ 590, 591; *supra*, §§ 652, 658. If the circumstances of a passenger's expulsion involved arrest and various indignities, such facts, if admissible, are better shown in a suit as for tort than where the action is laid in contract. *Murdock v. Boston & Albany R.*, 133 Mass. 15.

common carriage of goods and chattels or the strict bailment;¹ and it is outside the scope of this work to treat of them specially in this new connection, further than to refer the reader to the authorities.²

The rule of damages is practically applied with much regard to circumstances and the appearance of blame on either side; and for wanton, unprovoked, and aggravated misconduct or reckless negligence on the part of the carrier or his servants, producing bodily injury, juries are apt to award large punitive or exemplary damages, which courts, not uninfluenced by a sense of humanity, decline to set aside;³ though, as a general rule, the passenger who is injured by the fault of the carrier, especially if the carrier's servant acted in perfect good faith and without needless severity, has no right to ask punitive damages, but only such as may afford him due compensation by way of indemnity.⁴ Injury to one's feelings

¹ *Supra*, Part VI. c. 8.

² See 2 Redfield Railways, § 199; Angell Carriers, §§ 590-608, and cases cited; 2 Greenl. Ev. § 222 *et seq.*; and general works on Practice and Damages. And see *Roberts v. Graham*, 6 Wall. 578; cases cited in these chapters relative to the passenger-carrier's duties in each particular instance, *passim*. In suits for injuries, caused by the carrier's negligence, the substance of the issue may be proved, though not described with full particulars in the declaration. (Ind.) 8 N. E. 18. It should be constantly borne in mind, however, that the carrier is only to be sued for damage where his fault is the proximate cause of injury. Thus, for the malpractice of a surgeon prudently called in after an accident, it is not the carrier but the surgeon who should be sued. 18 Fed. R. 221. And see 76 Mo. 288.

³ *Hanson v. European R.*, 62 Me. 84; *Atlantic R. v. Dunn*, 19 Ohio St. 162; *Chicago R. v. Flagg*, 43 Ill. 364; *Palmer v. Railroad*, 3 S. C. 580. Cf. *Hagan v. Providence R.*, 3 R. I. 88; 70 Ga. 368; 63 Iowa, 417.

⁴ *Milwaukee & St. Paul R. v. Arms*, 91 U. S. 489, where the passenger-carrier authorities are amply cited on the question of damages; *Pullman Palace Car Co. v. Reed*, 75 Ill. 125; *Townsend v. New York Central R.*, 56 N. Y. 295; *Cincinnati R. v. Cole*, 29 Ohio St. 126; 11 Lea, 98.

What the passenger, who brings his action against the carrier for bodily injuries received through the carrier's default, may have received on an "accident insurance policy," because of such injury, cannot affect his claim for damages upon the carrier; for the right to insurance money arises out

and the indignity of a harsh and unlawful expulsion is to be considered in estimating damages.¹ If the passenger was himself in fault, as by angry altercation with the conductor so as to disturb the peace of others on board, he is not likely to recover punitive damages at all;² nor in any event, damages which were the remote, unforeseen, and indirect consequences of the grievance alleged against the carrier.³

of quite a different contract. *Bradburn v. Great Western R.*, L. R. 10 Ex. 1. The same may be said, *semble*, of a widow or kindred who are paid on a life-insurance policy in case the injured passenger dies of the injury inflicted by the carrier.

¹ See 46 N. J. L. 198; 47 N. J. L. 548.

² 15 Fed. R. § 57; *supra*, § 636.

³ 4 Col. 344; 114 U. S. 474; 14 Lea, 128. For examples of admissible circumstances, such as illness caused from the exposure, see *Cincinnati R. v. Eaton*, 94 Ind. 474; 62 Tex. 380; 62 Wis. 367.

CHAPTER IV.

TRANSPORTATION OF BAGGAGE.

§ 665. **Baggage Transportation Incidental to Carriage of the Passenger.** — Baggage transportation presents in the common law some unique features. No contract is made for carrying such property, as in the case of ordinary freight; but the duty of conveying the passenger's baggage as common carrier is incidental to the differently graded duty of conveying the passenger himself.¹ There is no tariff of rates, no special payment to be demanded of the owner; but one who pays his personal fare to a passenger-carrier is entitled (within limits to be presently noticed) to have his baggage taken likewise without extra charge.² And for baggage, as for the freight which one takes upon direct hire, the responsibility assumed is that of common carrier; while, on the other hand, the relation out of which grows the present indirect bailment, is that of passenger-carrier simply.

§ 666. **The same Subject; Vocation of Innkeeper Compared.** — We may say, then, that there is a bailment in respect of baggage, but none, to speak precisely, so far as the passenger himself is concerned. A like distinction avails as between the guest of an innkeeper and the personal property brought by that guest into the inn. Here, as in the case of the innkeeper, we find public policy making, by inference, an extraordinary bailee of the party whose vocation thrives by

¹ *Johnson v. Midland R.*, 4 Ex. 367, 372; *Oxlade v. North Eastern R.*, 15 C. B. N. s. 680.

² *Story Bailm.* § 499; *Angell Carriers*, §§ 107–116; *U. S. Digest*, 1st Series, *Carriers*, 376; cases *infra*.

the patronage of travellers; and this out of considerations of the general welfare.

But we must note that the passenger-carrier's incidental liability for his patron's baggage, though so strongly resembling that of an innkeeper, presents this striking point of difference, that here it applies to no more property than what travellers ought to take with them on a journey; whereas there it might embrace whatever a particular traveller had chosen to bring with him. No matter what a bag or trunk may contain, the law will charge the carrier of passengers as an insurer for what may legally be termed "baggage," and nothing else.

§ 667. **What is Baggage or Luggage.** — By "baggage," in the legal sense, is meant simply such articles of personal necessity, convenience, comfort, and recreation, as travellers, under the circumstances, are wont to take on their journey; ¹ or, as the expression goes, "ordinary baggage." The word "luggage" is, perhaps, the more common word used in the mother-country, as synonymous with our American term "baggage." ² Not only, then, is the kind of property thus carried material, but its quantity, its value, and more especially its suitableness for the purpose of the particular tour, must be taken into consideration.

§ 668. **The same Subject.** — Trunks, valises, carpet-bags, chests, and the like, with their common travelling contents, may be regarded as ordinary baggage; but wares and samples, though stowed away in such a receptacle, cannot; ³ nor can a sample trunk. ⁴ One's own shoes and wearing-apparel

¹ *Ib.*; Bouv. Dict. "Baggage."

² See Brown Law Dict.; 2 Redfield Railways, § 155. And see (Cal.) 11 Pac. 686.

³ *Cahill v. London R.*, 10 C. B. N. S. 154; s. c. 13 C. B. N. S. 818; *Pardee v. Drew*, 25 Wend. 459; *Stinson v. Conn. River R.*, 98 Mass. 83; *Mississippi R. v. Kennedy*, 41 Miss. 671.

⁴ *Alling v. Boston & Albany R.*, 126 Mass. 121; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; 17 Fed. R. 209.

are appropriately baggage ;¹ but a great quantity of new shoes and stock for shoes, or of cloth, whether wrought into garments or not, is rather to be considered merchandise, and intended for others than for the traveller's personal use and convenience.² A single watch and articles of personal jewelry have been held part of a traveller's proper baggage ;³ but quite the reverse as to a quantity of watches, jewelry, or plate, apparently designed for sale and traffic or presents.⁴

Not only such goods and chattels as are taken by the traveller for mere purposes of trade are found thus excluded from common carriage protection as "baggage," but, what may seem harsher, those whose taking, likewise with a view to the journey's end, has solely in view the convenience of the traveller's household, or something else ulterior to the journey itself ; things which are unsuitable, in fact, for use by the way, but only for use when the journey is over. Such, for instance, are the packed bedding and bed-clothing of one who is seeking out some new home ;⁵ and his pictures and household furniture in general.⁶ Nor need a child's spring-horse of heavy weight be accepted as baggage.⁷ And, as the law refuses to gratify a passenger by giving his merchandise and household articles a free trip at the carrier's special risk of dangers, so it disinclines to treat as baggage that which one

¹ *Duffy v. Thompson*, 4 E. D. Smith, 178; *Baltimore Steam Packet Co. v. Smith*, 23 Md. 402.

² *Collins v. Boston & Maine R.*, 10 Cush. 506. But see *Dexter v. Syracuse R.*, 42 N. Y. 326.

³ *Brooke v. Pickwick*, 4 Bing. 218; *Jones v. Voorhees*, 10 Ohio, 145; *McCormick v. Hudson River R.*, 4 E. D. Smith, 181; *Doyle v. Kiser*, 6 Ind. 242; *McGill v. Rowand*, 3 Penn. St. 451; *American Contract Co. v. Cross*, 8 Bush, 472.

⁴ *Richards v. Westcott*, 2 Bosw. 589; *Bell v. Drew*, 4 E. D. Smith, 59; *Mississippi R. v. Kennedy*, 41 Miss. 671.

⁵ *Macrow v. Great Western R.*, L. R. 6 Q. B. 612; *Connolly v. Warren*, 106 Mass. 146.

⁶ See *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

⁷ *Hudston v. Midland R.*, L. R. 4 Q. B. 366.

takes with him for a present to his friend, or to accommodate third parties with whom the carrier is in no privity, and from whom he is to get no profit.¹

But, while the courts persistently refuse to enhance the carrier's extraordinary risk for the privilege of those who would abuse their opportunities of having things taken without extra charge which ought to be paid for as freight, they accord willingly to passengers who *bona fide* pay their fares a liberal interpretation of the right to carry on the footing of baggage whatever may in a genuine sense be needful or convenient for one's present journey, though by no means for the journey exclusively. A set of tools of reasonable worth may thus be included in a carpenter's or mechanic's baggage;² professional instruments in that of a surgeon;³ a manuscript price-list in that of a travelling agent;⁴ books needful for prosecuting his studies in that of a student;⁵ whatever, in fine, might prove useful and convenient on the way to one of a particular class of travellers, though its chief use be at the journey's end. Even pistols, revolvers, or other weapons, carried for one's defence, and not as merchandise, may be classed as baggage, especially on dangerous routes.⁶ So, too, as it is held, a sportsman's gun or fishing-tackle carried on a trip for his personal recreation;⁷ an opera-glass;⁸ or under

¹ *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225. The decision in *Chicago R. v. Boyce*, 73 Ill. 510, rests probably on this ground; rather than upon any abstract proposition that a sacque and muff and silver napkin rings can be no part of a gentleman's baggage. And see *Dexter v. Syracuse R.*, 42 N. Y. 326.

² *Porter v. Hildebrand*, 14 Penn. St. 129; *Kansas City R. v. Morrison*, 34 Kan. 502.

³ *Hannibal R. v. Swift*, 12 Wall. 262.

⁴ *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85.

⁵ *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64.

⁶ *Woods v. Devin*, 13 Ill. 746; *Davis v. Southern Michigan R.*, 22 Ill. 281. But cf. *Giles v. Fauntleroy*, 13 Md. 126.

⁷ *Parmelee v. Fischer*, 22 Ill. 212; *Angell Carriers*, § 115; *Van Horn v. Kermit*, 4 E. D. Smith, 453.

⁸ *Toledo, &c. R. v. Hammond*, 23 Ind. 379.

fitting circumstances, and, more especially for invalid travellers, even pillows, bedding, or chairs.¹ The legal distinction is not always clearly traceable, perhaps, for circumstances are allowed their due weight in each case.

§ 669. **The same Subject; Money, etc.** — For money which is included *bona fide* in the passenger's baggage for his travelling expenses and personal use on the journey, not, however, exceeding a reasonable sum, it is now well settled that a passenger-carrier is liable as insurer;² though some earlier cases ruled otherwise.³ But money taken by the passenger in large amounts,⁴ and greater than he can need as a traveller, especially if it be intended for some ulterior purpose, as to buy at the place of his destination merchandise, household goods, or (as sometimes held) clothing,⁵ will fail of the law's safe shelter. Neither money taken by an attorney for his client to meet the contingencies of a lawsuit, nor title deeds, can be classed with baggage;⁶ nor, in general, money which belongs to some stranger instead of the passenger who is travelling with it.⁷ As a rule, money which is intended purely for trade, business, or investment, or for transportation, and not for the passenger's own use and convenience, cannot be termed baggage.⁸

¹ See *Onimit v. Henshaw*, 35 Vt. 604; *Parmelee v. Fischer*, 22 Ill. 212.

² *Merrill v. Grinnell*, 30 N. Y. 594; *Duffy v. Thompson*, 4 E. D. Smith, 178; *Jordan v. Fall River R.*, 5 Cush. 69; *Illinois Central R. v. Copeland*, 24 Ill. 332; *Johnson v. Stone*, 11 Humph. 419; *Michigan Central R. v. Carrow*, 73 Ill. 348; *Hutchings v. Western R.*, 25 Ga. 61.

³ *Grant v. Newton*, 1 E. D. Smith, 95; *Bomar v. Maxwell*, 9 Humph. 621.

⁴ *Orange County Bank v. Brown*, 9 Wend. 85; *Davis v. Michigan R.*, 22 Ill. 278; *Doyle v. Kiser*, 6 Ind. 242; *Yznaga v. Steamboat Richmond*, 27 La. Ann. 90; *Johnson v. Stone*, 11 Humph. 419; *Whitmore v. Steamboat Caroline*, 20 Mo. 513; *First Nat. Bank v. Marietta R.*, 20 Ohio St. 259; *Weeks v. New York, &c. R.*, 16 N. Y. Supr. 609.

⁵ *Hickox v. Naugatuck R.*, 31 Conn. 281.

⁶ *Phelps v. London R.*, 19 C. B. n. s. 321.

⁷ *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

⁸ (Cal.) 11 Pac. 686.

Against holding the passenger-carrier strictly accountable as a common carrier for large sums thus taken, two objections occur: (1) that, for a traveller's personal use and convenience, a moderate amount should suffice; (2) that the traveller is himself to blame if he lets large sums, and property which is exceedingly valuable, go in a closed trunk into the exclusive custody of a bailee, without giving him some means of knowing what great risk he runs. But the concealment of a small sum of money in one's trunk is not such carelessness or misconduct in the passenger as should exonerate the carrier; nor, again, such a concealment of his watch, or of his own jewelry of moderate worth.¹

§ 670. **The same Subject; Value, etc.** — In determining the value of articles which one may reasonably take as baggage, the rank and station of the traveller are circumstances worth considering. A steerage passenger's clothing, for instance, would not be costly in comparison with that of some wealthy person travelling on a first-class ticket. To the extent that articles taken by any passenger for his personal use when travelling exceed in quantity and value such as passengers of like station and pursuing like journeys commonly take, they are not baggage in the strict sense. But whether such excess is taken or not is a question of fact for the jury.²

¹ *Jones v. Voorhees*, 10 Ohio, 358; *McCormick v. Hudson River R.*, 4 E. D. Smith, 181; *Fairfax v. N. Y. Central R.*, 73 N. Y. 167.

For so great a sum as \$11,250, concealed in a passenger's trunk, the carrier is certainly not liable as for baggage. *Orange County Bank v. Brown*, 9 Wend. 85. In *Davis v. Michigan R.*, 22 Ill. 278, \$439 was considered an unreasonable amount. Jewelry worth \$30,000 should not be checked as ordinary baggage. *Michigan Central R. v. Carrow*, 73 Ill. 348. But in *Jordan v. Fall River R.*, 5 Cush. 69, the sum of \$325 taken in a traveller's trunk on a short journey was recovered. And Denio, C. J., in *Merrill v. Grinnell*, 30 N. Y. 594, considered \$800 in coin not an excessive amount for an emigrant passenger to bring over with his baggage.

² *N. Y. Central R. v. Fraloff*, 100 U. S. 24. Cf. as to costly jewelry which was taken as merchandise, *Michigan Central R. v. Carrow*, 73 Ill. 348.

§ 671. **The same Subject; Conclusion as to what is Baggage.** — In all this blending of law and fact, much must practically be left to abide the verdict of a jury.¹ And, in estimating the kind, quantity, and value of the baggage which is allowable to the passenger, it is fair to take into view whence he comes, whither he goes, and what is his occupation and social standing. Many of the late cases incline to be very liberal in this respect towards the passenger, to the extent, even, of rendering definitions of “baggage” extremely uncertain.² Moreover, according to the treatment bestowed upon certain articles which the passenger takes with him, both carrier and passenger or either may be estopped to deny that they were “baggage.”³

§ 672. **Nature and Extent of Risk for Baggage; Common Carrier Liability.** — Now, concerning the nature and extent of that

¹ See *Ouimit v. Henshaw*, 35 Vt. 603; *McGill v. Rowand*, 3 Penn. St. 451; *Fairfax v. N. Y. Central R.*, 73 N. Y. 167; *Brock v. Gale*, 14 Fla. 523.

² In *Dexter v. Syracuse, &c. R.*, 42 N. Y. 326, a railway was held chargeable for materials for dresses as well as clothing designed for a family. And it is here observed by Smith, J., that the rule would be too strict and narrow for these times, to confine the baggage risk to such articles as the passenger has occasion for while on his journey.

A case yet more striking in its application of the rule is presented in *N. Y. Central R. v. Fraloff*, 100 U. S. 24, the latest leading decision on the subject. Here the majority of the justices (Justices Field, Miller, and Strong, diss.), in effect, upheld a verdict against a railroad company to recover, as “baggage,” laces valued by the lady passenger at \$75,000, and by the jury at \$10,000. This is, perhaps, the severest visitation of loss upon a passenger-carrier which the reports show, in respect of property transported as a mere incident to the hired conveyance of the traveller’s person. But the circumstances of the case are quite peculiar. The laces were in no sense to be regarded as “merchandise,” but were in actual use as wearing-apparel by a foreign lady of superior rank and wealth; and had money or jewels of this value been carried in a trunk instead, the verdict could not have stood, with any respect for precedents. But the trunk being the natural receptacle for such things, there appears to have been good reason in leaving the jury to pass upon the general question of its suitableness in value and quality to the person travelling who suffered loss.

³ *Hoeger v. Chicago R.*, 63 Wis. 100; § 673 *post*.

risk which the passenger-carrier incurs with respect to his passenger's baggage, Lord Holt twice declared pointedly that the extraordinary responsibility of common carrier would not attach, unless the baggage was specially paid for.¹ And, as the law became well settled in much later times, that for the passenger himself no such extraordinary risk was incurred, jurists began to argue, not without some force, that the carrier's obligation to convey baggage, being but accessory to carrying the passenger, and a matter of personal convenience to him, ought to be the same in degree.² But the current of modern decisions, English and American, is decidedly to the contrary; and, whether the conveyance be by horse or steam power, by land or by water, it is now firmly settled that, for a passenger's baggage, the carrier of passengers assumes the full risks of a common carrier; in other words, that he is to be regarded in this particular as an insurer, a carrier of goods, and not a carrier of passengers.³ The sum paid for the passenger's own fare is the carrier's compensation, then, for this incidental but momentous responsibility; which fare all who travel are presumed to pay, since the carrier has a right to charge it and enforce the collection.⁴ Nor matters it, provided the fare be paid, whether the traveller himself furnished the money, or others did so on his behalf.⁵ For baggage of an unreasonable quantity, a carrier may always demand special compensation from the passenger concerned; but, long before

¹ *Middleton v. Fowler*, 1 Salk. 282; *Upshare v. Aidee*, 1 Comyns, 25.

² See *Pollock, C. B.*, in *Stewart v. London R.*, 3 H. & C. 139.

³ *Great Western R. v. Goodman*, 12 C. B. 313; *Brooke v. Pickwick*, 4 Bing. 218; *Cockburn, C. J.*, in *Macrow v. Great Western R.*, L. R. 6 Q. B. 612, 618; *Angell Carriers*, §§ 108-112; *Story Bailm.* § 499; *Hollister v. Nowlen*, 19 Wend. 234; *Hawkins v. Hoffman*, 6 Hill, 586; *Peixotti v. McLaughlin*, 1 Strobb. 468; *Jones v. Voorhees*, 6 Ohio, 358; *Hannibal R. v. Swift*, 12 Wall. 262; *Merrill v. Grinnell*, 30 N. Y. 594; *Dunlap v. International Steamboat Co.*, 98 Mass. 371; *Smith v. Boston & Maine R.*, 44 N. H. 325, 330; *N. Y. Central R. v. Fraloff*, 100 U. S. 24.

⁴ *McGill v. Rowand*, 3 Penn. St. 451.

⁵ *Van Horn v. Kermit*, 4 E. D. Smith, 453.

railways were introduced, the practice prevailed, in England and America, of making no charge for baggage unless it exceeded a certain weight.¹

A standard of extraordinary responsibility like this must have been erected mainly for the comfort and convenience of the travelling public. Yet the carrier himself goes not unheeded; for, not only is his merely incidental risk kept down to what is reasonable in kind, quantity, and value for his patron's baggage, and his legal right recognized to charge for whatever may be in excess, but he can fix the ordinary tariff of passenger fares high enough to afford him ample indemnity for the liability he so incurs; and it is clear that, were the baggage liability diminished, the public would travel less frequently than they do at prevailing rates.

§ 673. **Carrier's Liability for what is not strictly Baggage.** — Some uncertainty prevails at our law concerning a passenger-carrier's liability for that which is not properly baggage, and yet has been accepted as though it were, or for the excess over reasonable baggage. Should merchandise be packed into a passenger's trunk, and put on board a train, it may be presumed that the carrier was misled into receiving it, whether the passenger intended to deceive him or not; and hence that he could claim, to say the least, all the privileges of a gratuitous and unrewarded bailee.² And, indeed, a passenger who

¹ See Lord Holt, in 1 Comyns, 25. The rule of the text applies to all carriers of passengers who travel customarily with baggage; not naturally to a horse-railway, omnibus, cab, or hackney coach, whose customers are merely conveyed from street to street. But the character of the business pursued is more material than the nature of the vehicle; and if the patrons of the carrier are such as take baggage with them — as for instance, where a hackman or omnibus owner drives to and from a railway station — the liability for baggage is that of a common carrier. See *Dibble v. Brown*, 12 Ga. 217. And see *supra*, Part VI. c. 2; Part VII. c. 1. *Quære*, whether as a carrier of "baggage," and not rather of the trunk as merchandise.

² *Cahill v. London R.*, 13 C. B. N. S. 818; *Collins v. Boston & Maine R.*, 10 Cush. 506; 4 Mo. App. 582; *Alling v. Albany R.*, 126 Mass. 121; *Haines v. Chicago R.*, 29 Minn. 160.

tries to send things through in his closed trunk on a free transit, which he knows is not baggage but ought to be paid for as freight, has surely little countenance to ask from a court of justice; his fraud debars him from recovery. But where the conduct of the passenger was fair and open, and the carrier or his proper agent must have known what he accepted, the case appears different. Here, supposing the passenger-carrier to have received, for a special recompense, what he saw was not baggage, the undertaking he assumes may be regarded as one for carrying such things through as a common carrier: not, perhaps, as a carrier of special baggage, but rather like any other carrier of freight.¹

If, however, the carrier receives that which obviously to himself is not baggage, but merchandise, and checks it through without demanding a special payment, nor, on the other hand, refuses to transport it with the passenger at all, how stands the carriage risk? Simply as that of a carrier without reward, we may suppose, if circumstances warrant the inference of an undertaking to do the passenger a mere favor. And, generally, a carrier becomes, as concerns personal property in his charge, which remains there unaffected by fare or freight, a bailee without recompense; or, perhaps, if it were put into his vehicle without his knowledge or assent, and so remained, he would be no bailee at all; and, once more, should the baggage agent and bailor transgress what both knew were plain rules of the company in the transaction, it might be said that the bailment was not to the company but to the baggage agent merely in his personal capacity. But any carrier who knows that he is transporting certain property may silently reserve his right to charge for the service at the end of the journey; and hence the inclination shown, in some late railway

¹ *Glasco v. New York R.*, 36 Barb. 557; *Dewey, J.*, in *Collins v. Boston & Maine R.*, 10 Cush. 506; *Sloman v. Great Western R.*, 67 N. Y. 208; *Perley v. N. Y. Central R.*, 65 N. Y. 374; *Strouss v. Wabash R.*, 17 Fed. R. 209.

precedents of the highest importance, to charge the passenger-carrier to the full extent of a common carrier of freight,¹ where he receives from a *bona fide* passenger articles which, packed so as not to have the false appearance of baggage, were offered him in good faith; both parties being silent as to making a charge for their carriage.²

On the other hand, paying extra, as though for one's baggage of over-weight, is held not to entitle any passenger's concealed merchandise to go through as paid freight.³ And in the English House of Lords, a passenger who had sought to evade the rules of a railway, which forbade merchandise to be carried by passengers without being paid for as such, was not permitted to recover for its loss, notwithstanding a servant of the company, on the journey, had it taken from the passenger car, whither he had brought it, and placed in a baggage car.⁴

¹ For railway companies, it is remembered, pursue a double vocation, being both carriers of passengers and common carriers of goods and merchandise.

² *Great Northern R. v. Shepherd*, 8 Ex. 30; *Hannibal R. v. Swift*, 12 Wall. 262, 271; *Chicago R. v. Conklin*, 32 Kan. 55. In *Hannibal R. v. Swift*, Mr. Justice Field uses the following language: "Where a railroad company receives for transportation, in cars which accompany its passenger trains, property of this character [*i. e.*, articles which do not constitute personal baggage], in relation to which no fraud or concealment is practised or attempted upon its employés, it must be considered to assume, with reference to it, the liability of common carriers of merchandise." And he further adds, that "if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and it is received for transportation on the passenger train, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

³ *Cincinnati R. v. Marcus*, 38 Ill. 219. Cf. *Strouss v. Wabash R.*, 17 Fed. R. 209.

⁴ *Belfast R. v. Keys*, 9 H. L. 556. And see *Cahill v. London R.*, 10 C. B. N. s. 151; 13 C. B. N. s. 818; *Smith v. Boston & Maine R.*, 44 N. H. 325; *Flint R. v. Weir*, 37 Mich. 111; *Michigan Central R. v. Carrow*, 73 Ill. 348.

§ 674. **The same Subject.**—The reconciling principle of these decisions appears this: that the party who thus offers goods for transportation is bound to the observance of honest faith; but that, exercising such faith, he may throw it upon the carrier to put certain inquiries and to make timely assertion whether articles of doubtful kind or value shall go as baggage or not.¹ Thus is the rule stated by our highest American tribunal: if the traveller, by device or artifice, puts off inquiry as to value, and thus imposes on the carrier an extreme responsibility, the loss is his own. But any passenger-carrier has the right to ask the value of the baggage offered, and where neither legislation nor a special rule or contract of the carrier to the contrary is shown, nor conduct by the passenger

¹ So far do the courts favor, as against the carrier, a passenger who has practised no concealment or cunning artifice, that in one of our State courts, not long since, a railroad company was adjudged strictly liable for the loss of carpeting which a passenger had delivered with his trunk to the baggage-master of a passenger train, notwithstanding it appeared in proof that no distinct price was asked or offered for its carriage, and the printed rules of the company forbade baggage-masters to receive articles of merchandise as baggage. The passenger being ignorant of these rules, it was deemed that acts of the agent within the usual scope of his employment would sufficiently bind the employer regardless of his private instructions. It might be added, however, that the carpeting so readily received appears to have been somewhat carelessly looked after, even on the theory of a lesser bailment responsibility; for the baggage-master, giving the passenger a check for his trunk, assured him that one check would do for both, and promised to strap the carpeting on the trunk, so that it would go safely. *Minder v. Pacific R.*, 41 Mo. 503.

But cf. *Michigan Central R. v. Carrow*, 73 Ill. 348, which, together with a recent Massachusetts case, *Alling v. Boston & Albany R.*, 126 Mass. 121, appears to incline to the view that a passenger who gives his trunk silently to be checked as personal baggage represents by implication that it contains nothing else. But in each case the facts were peculiar. In the Massachusetts case it was claimed that the trunk, which contained samples of merchandise, was accepted by the carrier's agent as a "sample trunk," and that he knew it was such by its appearance. But the court held that there was no evidence that he knew this, and, at most, might only have suspected it. See also *Haines v. Chicago R.*, 29 Minn. 160, where the facts were similar.

misleading the carrier as to the value of the baggage, the mere failure of the passenger unasked to disclose such true value is not of itself a fraud upon the carrier, such as to defeat recovery for a loss.¹

On the other hand, where it is not a question of excessive or doubtful baggage, and the carrier has no knowledge as to what was given him in a closed receptacle, the inclination is to exonerate him from a common carrier's risk for what was no baggage.² For while the common carrier may ask the value, he is not usually to inquire what a closed package contains, but rather to transport according to appearances and what the customer's conduct imports. And, at all events, the passenger may himself be debarred by his own conduct from claiming in case of loss that the articles carried were not "baggage" but "freight."³

§ 675. **Rule that Passenger and Baggage should go together.**—The implied undertaking of the passenger-carrier as to transporting baggage is that passenger and baggage shall go together; since all baggage is taken with reference to the wants of a particular journey. The convenience of the travelling public, and the carrier's own security against the imposition of strangers, alike favor such an understanding. If, then, the passenger has his baggage sent some days after his own departure, the carrier, who is not at fault for the delay, may treat it as freight, and charge accordingly; and upon his right to do so must depend what degree of liability may exist for a loss occasioned in the course of its transportation.⁴

¹ *N. Y. Central R. v. Fraloff*, 100 U. S. 24.

² Thus is it with trunks which contain "merchandise samples;" for it must be a passenger's own fault if he does not know that this is not, properly speaking, his baggage. *Alling v. Albany R.*, 126 Mass. 121; *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; *Haines v. Chicago R.*, 29 Minn. 160.

³ *Hoeger v. Chicago R.*, 63 Wis. 100.

⁴ *Wilson v. Grand Trunk R.*, 56 Me. 60. But cf. *Logan v. Pontchartrain R.*, 11 Rob. (La.) 24.

Nor ought the carrier, without permission, to send the baggage by later trains or a different route, unless in a strong case of necessity.¹ We need hardly add that if through the carrier's own action passenger and baggage become separated, the carrier bears the risk.

§ 676. **Baggage Express distinguished; where Passenger is not taken.** — So far is the doctrine carried which limits application of the common-carriage liability for a passenger's baggage, as such, to cases where the passenger is carried for fare, and the baggage only as an incident, that in a recent instance; where a traveller delivered a trunk to a city baggage expressman, whose business it was to take either passengers with their baggage, or baggage alone, from the railway station, to be transported for hire from the depot to a hotel, and took no personal passage in the conveyance, the expressman was held answerable, not for articles useful and convenient for a journey alone, but for the trunk and entire contents, like any carrier of merchandise.²

§ 677. **When the Carrier's Liability for Baggage commences.** — The delivery of baggage to the carrier of passengers and his acceptance thereof illustrates the doctrine of a previous chapter.³ As soon as the passenger-carrier or his baggage-agent accepts the thing from the traveller for present transportation, the risk of carrier will properly commence; not, however, when it comes into his hands to be stored, awaiting the owner's further orders. A strict interpretation of railway rules might seem to require the passenger to buy his fare ticket, show it to the baggage-master, and get from him checks or labels, whose duplicates the carrier must affix to

¹ See *Fairfax v. N. Y. Central R.*, 73 N. Y. 167.

² *Parmelee v. Lowitz*, 74 Ill. 116. It might, however, be a question whether a baggage expressman has not a right to stipulate by his contract for carrying such articles for the public as "baggage" only, according to the legal meaning of the word.

³ See Part VI. c. 3, as to the common carrier's duty to receive, and what constitutes a bailment of the property.

the trunks or packages, as a means of identifying them; and that all this ought to be done before the passenger can charge the company with acceptance. Yet checking or labelling baggage, and the delivery of such tokens to the traveller, whether the fare has been paid or not, by no means concludes the date of acceptance for carriage, which, in point of fact, may have been considerably earlier. In the hurry of loading and starting passenger trains, baggage may be accepted off-hand, without the pursuance of strict formalities, and even before the passenger has bought his own ticket. Checks afford, doubtless, the best evidence, in general, of baggage acceptance; and yet, while some railways, to increase their custom, will send checking agents to the owner's abode, and there make acceptance of baggage and assume full risks, it is not uncommon for steamboats, while taking the trunks on board with the passenger, to delay checking, if they check at all, or issuing a bill of lading, until the boat has left its pier; so, too, may passengers by land or water be expected, as a matter of convenience, to give up or exchange their checks shortly before some terminus is reached, in expectation of some new and different carriage. Circumstances, then, must determine the date of the delivery and acceptance of baggage, independently of mere forms.

Cases, indeed, have been decided, where acceptance was held to have closed upon the delivery of baggage, hours before the train or vehicle was ready to start. It is now customary and incumbent upon every railway to keep an agent at all important stations, to receive and take charge of the passengers' baggage.¹ And where this agent receives baggage from a passenger who awaits the train, the presumption naturally arises that he assumes, on behalf of the company, the carriage, and not the warehouse relation, even though he should defer giving a check until later; and American courts incline to favor the convenience of travellers in this respect, where

¹ *Jordan v. Fall River R.*, 5 Cush. 69.

the issue of acceptance appears in doubt.¹ The checking agent's absence from his post cannot, of course, be set up to exonerate the company's acceptance by a temporary substitute, or otherwise.²

§ 678. **The same Subject.**— There should, however, be an actual or constructive acceptance of the baggage for present transportation by the carrier in all such cases, in order to bind him as insurer.³ And the receipt by a freight-agent, of a person's trunk, to be stored over night, and taken next day to the passenger depot to be checked for transportation, may render the company no more than a custodian, and that only a gratuitous one.⁴ Where, in short, articles constituting bag-

¹ In *Hickox v. Naugatuck R.*, 31 Conn. 281, a railway company was held liable as carrier for a passenger's trunk received for the next train, which was to leave several hours later, though, according to custom, no check was to be given until fifteen minutes before the train left. In the opinion pronounced by Butler, J., in this case, appears a somewhat misleading statement concerning the custom of checking baggage: namely, that it can have no effect upon the character of the delivery. Admitting that a check is in the nature of a receipt, and not the contract, but evidence of the ownership, delivery, and identity of the baggage, we should also keep in mind that it is the means, and often the only one, of ascertaining the thing's destination. The present case, however, was rightly decided; for, as the report incidentally shows, the passenger, when he brought the trunk, told the baggage-master to what place he wished it sent. But trunks are rarely left with so explicit a direction in advance of being checked, and for baggage thus received by a railway agent without knowledge of its destination the company ought not to be held to the strict relation of carrier, but rather to that of warehouseman, whose obligation to transport remains in suspense until the owner gives further directions. *Spade v. Hudson River R.*, 16 Barb. 383. A railway train which makes many stops is not on precisely the same footing in this respect as a boat which carries all freight, passengers, and baggage between two fixed points. Cf. *Camden R. v. Belknap*, 21 Wend. 354.

For latest English authority, see *Bunch v. Great Western R.*, 17 Q. B. D. 215.

² *Jordan v. Fall River R.*, 5 Cush. 69; *Freeman v. Newton*, 3 E. D. Smith, 246. And see *Fairfax v. New York R.*, 67 N. Y. 11.

³ *Wright v. Caldwell*, 3 Mich. 51; *Butler v. Hudson River R.*, 3 E. D. Smith, 371; *Gasway v. Atlanta R.*, 58 Ga. 216.

⁴ *Van Gilder v. Chicago R.*, 44 Iowa, 548.

gage are received, whose owner does not intend yet to travel, or may not travel at all, the bailment being merely on storage for the owner's temporary convenience, the carrier is liable in our law only for gross negligence, should loss or damage be occasioned to the property.¹

§ 679. **Reciprocal Duties of Passenger and Carrier as to Receiving.** — The carrier and his passenger have reciprocal duties in the bailment of baggage. The one cannot violate his obligations to the public by an arbitrary selection of his patrons, nor refuse to receive the reasonable baggage as incidental to the fare of one who rightfully offers himself for the journey as a passenger, and is ready to pay the usual fare in advance;² moreover, it rests upon him to make known his objections seasonably, if any exist, for declining to receive passenger or baggage, so as not to force the applicant into any false posture unfairly.³ On the other hand, reasonable rules of the carrier must here as elsewhere be complied with; if baggage is offered, one should be ready to pay his passenger fare in advance; nor can any passenger require that his trunk, chest, or valise be accepted at an unseasonable time or place, or that more than his proper baggage be taken without extra remuneration. And as the carrier may waive his own rights in such a case, so may the passenger.⁴

¹ *Clark v. Eastern R.*, 139 Mass. 423, where the trunk was stored in a room which contained oil and cotton waste, and accidental fire occurred; *Little Rock R. v. Hunter*, 42 Ark. 200.

² *Supra*, c. 1.

³ In *McCormick v. Pennsylvania Central R.*, 80 N. Y. 353, a passenger bought tickets for his family. The baggage-master would not check all the trunks unless an extra charge was paid, alleging that the tickets presented would not pass so much baggage. The passenger then demanded his trunks, declining to go on the train, but the baggage-master said he had not time to take them out of the car. The baggage was sent without the passengers. These circumstances were found to constitute nominally a conversion, the baggage-master's refusal to restore the trunks being inexcusable. See *ib.* 99 N. Y. 65.

⁴ Cf. *McCormick v. Pennsylvania Central R.*, 80 N. Y. 353; *ib.* 99 N. Y. 65. If the baggage-master checks a trunk before the passenger buys

Moreover, as in the transportation of goods and merchandise for hire, the customer should fasten properly what he offers and have it duly marked, unless, indeed, the carrier's check or label suffices; since otherwise a loss or misdelivery may be chargeable to his own carelessness. He must not practise deception; and he must, besides, yield possession and control to the carrier in order to make the latter fully liable.¹

§ 680. **Bailment of Hand-Baggage; Mixed Custody.** — Certainly no acceptance for reward arises where a passenger delivers as his baggage that which really secretes another's goods, or even his own merchandise.² But as to yielding custody to the carrier, the rule is a difficult one where the passenger's hand-baggage is concerned. For a passenger's personal apparel and effects, which he retains about his person while travelling, a carrier is held to assume no strict responsibility, inasmuch as they are not confided to his keeping.³ So is it where loss occurs before the carrier has started, and the baggage has not been intrusted to the carrier or his servant for immediate transportation.⁴ For money which the passenger carries in his pocket, the carrier is not strictly liable.⁵ Nor for the valise or effects which a traveller by water keeps in his berth and under his exclusive care.⁶ Upon his ticket, the carrier is liable, though this course should be contrary to the company's rule. *Lake Shore R. v. Foster*, 104 Ind. 293.

¹ See *supra*, Part VI. c. 3. Delivering a parcel to a friend, with instructions to have the common carrier book it to London, leaves the friend the responsible bailee, in case of loss, if, instead of so doing, the latter puts the parcel into his own carpet-bag, intending to take it personally on his passage to London, and thereby save the freight. *Miles v. Cattle*, 6 Bing. 743. And see *Dunlap v. International Steamboat Co.*, 98 Mass. 371.

² *Ib.*; *supra*, §§ 673, 674.

³ *Tower v. Utica R.*, 7 Hill, 47; *Angell Carriers*, §§ 113, 140, 141.

⁴ *Bergheim v. Great Eastern R.*, 3 C. P. D. 221.

⁵ *Abbott v. Bradstreet*, 55 Me. 530.

⁶ *Cohen v. Frost*, 2 Duer, 335. And see *Pullman Palace Car Co. v. Smith*, 73 Ill. 360.

the point whether a steamboat passenger can hold the steamboat to a common carrier's risks for articles which he retains under his own immediate care in his state-room, authorities do not harmonize.¹ In short, it is often assumed that for a passenger's hand-baggage the carrier assumes no responsibility; though one should say rather that there is here a sort of mixed custody, in which both passenger and carrier participate.²

§ 681. **Common-Law Liability for Baggage stated.** — If, then, the liability of a carrier for his passenger's baggage be that of a common carrier, it follows at common law the familiar rule already announced; so that in case of an accident it might sometimes occur that the carrier would be legally liable for the baggage, though not for loss or injury to the passenger himself; the standard for the two cases being set differently.³ And it is readily perceived that for such articles as the law pronounces baggage, the public passenger-carrier who once becomes charged with a full bailment delivery from the owner, and acceptance, stands bound to answer wherever a loss or injury occurs thereto, which cannot, by way of excuse, be attributed to act of God, act of public enemies, act of the customer, or act of public authority.⁴ But any such excuse is of course available in defence.

¹ The carrier is held thus liable in *Mudgett v. Bay State Steamboat Co.*, 1 Daly (N. Y.), 151; *Gore v. Norwich Trans. Co.*, 2 Daly (N. Y.), 251. But see, *contra*, *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Clark v. Burns*, 118 Mass. 275; *Abbott v. Bradstreet*, 55 Me. 530; *American Steamship Co. v. Bryan*, 83 Penn. St. 446. The court were equally divided in *McKee v. Owen*, 15 Mich. 115. And see *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Welch v. Pullman Palace Car Co.*, 1 Sheld. N. Y. Super. 457.

² *Post*, § 682.

³ *Supra*, c. 2.

⁴ *Macrow v. Great Western R.*, L. R. 6 Q. B. 612, 618; *Story Bailm.* § 499; *Brooke v. Pickwick*, 4 Bing. 218; *Camden & Amboy R. v. Belknap*, 21 Wend. 351; *Angell Carriers*, §§ 107-116; 2 *Redfield Railways*, § 155; *supra*, §§ 405, 672; *Dill v. South Carolina R.*, 7 Rich. 158.

§ 682. **Liability for Hand-Baggage, etc., considered.** — But our decisions do not yet make it quite plain how far, for property which is taken in the vehicle by a passenger on the strength of having paid his passage fare, the carrier may incur a bailment liability, when that property is either hand-baggage which he cares for himself or, because of its kind or value, it falls short of the legal and extraordinary protection of "baggage."¹ The implied undertaking of the carrier towards one who purchases a passage-ticket is, doubtless, to carry the passenger himself, with the lesser liability of a passenger-carrier, and the passenger's articles of personal convenience and necessity for the journey, known as "baggage," in the more onerous capacity of common carrier. Here it is rational to assert that, in general, for a passenger's wearing-apparel in actual use, his cane, umbrella, shawl, hand-satchel, or whatever else he may have about his person, not committed specially to the baggage servants of the carrier, the latter runs little practical risk;² and the same as to money and valuables, which the passenger takes exclusively, secretly, and unconfidingly on his person, especially if this be of exceeding value;³ consequently the passenger, in respect of such property, must naturally bear his own loss. The reason of this is deducible, seemingly, from the presence of one or more of the following distinct elements in such cases: (1) retention of possession by the owner, or the want of sufficient delivery, so that no full bailment was created; (2) negligence or bad faith on the passenger's part so contributing to the loss as ought to exonerate any bailee, even a common carrier; (3) bailment, but in such a sense as to render the carrier in truth a bailee without recompense, and responsible only for the

¹ *Cohen v. Frost*, 2 Duer, 335; *Abbott v. Bradstreet*, 55 Me. 530; *Tower v. Utica R.*, 7 Hill, 47; *Angell Carriers*, §§ 113, 140; *supra*, §§ 356-361.

² *Ib.*

³ See *Abbott v. Bradstreet*, 55 Me. 530; *Weeks v. New York R.*, 72 N. Y. 50.

lowest degree of care and diligence. And according as one or another of these elements predominates, so may we expect to find the carrier acquitted of liability; sometimes as an ordinary bailee, sometimes as an extraordinary bailee, and sometimes as no bailee at all.

Now, it seems hardly logical to assert that where one, with the carrier's knowledge and assent, takes articles, like an overcoat, umbrella, valise, or carpet-bag, which might have been committed to the carrier's exclusive custody as baggage, into the car or state-room which he occupies, and places them near his seat, so that he can see, and if need be use them, they are transported in fact with him, and yet in the legal sense were not bailed to the carrier at all. Passengers must have certain of their baggage about them, if the very term "baggage" subserves its own definition. And the custom of thus depositing baggage is expressly sanctioned by the carrier himself, in numerous modern instances: where, for instance, not only a van or baggage car is provided, but racks overhead in the passenger cars; or, where a posted notice announces that passengers may retain their seats by depositing such articles upon them. In a stage-coach, on a hack, and in various other passenger vehicles, all baggage is carried where the passenger may see it, and one values the opportunity of having an eye, as it is said, to the carrier's performance of his own duty. Rather should we say that for such light baggage of which the passenger has control there is a bailment with a mixed custody and a mixed bailment responsibility; that the passenger-carrier assumes by implication his own legal risk towards them, under the qualification that the owner, on his part, and to the extent of his own control, shall exercise ordinary care and diligence. For, to give a modern application to the law, as defined in one of the English stage-coach cases, "if a man travel in a stage-coach [or other public vehicle] and take his portmanteau with him, though he has his eye upon the portmanteau, yet the carrier

is not absolved from his responsibility, but will be liable if the portmanteau be lost.”¹

§ 683. **The same Subject.** — Hence, where a passenger's baggage is, at his request, put into the car he properly occupies, and stolen while he negligently rides in another car, the careless act of the passenger will be assumed the occasion of the loss, so as of itself sufficiently to excuse the carrier; for the owner had bound himself by implication to keep up a personal guard and exercise due diligence for the safety of his own effects.² His careless exposure of valuables contained in a satchel to the gaze of strangers, his blind incredulity, or his foolish non-resistance against thieves who enter the car and seek to victimize him, might in like manner bear in proof against him.³ And, generally speaking, where the passenger keeps articles of baggage exclusively about his person, it may be presumed that whatever loss occurs is excusable to the carrier on the plea of the passenger's own act. The passenger who forsakes carelessly the property which he keeps in his own charge must answer for its safety.⁴

Yet the passenger-carrier, as it would appear, remains chargeable as extraordinary bailee on his part, whenever aware, himself or by his suitable agents, that articles of baggage are thus retained near by the passenger on the journey, and where by his own acts and conduct he assents thereto; so that, if loss should appear without imputing fault to the passenger he must show some good cause of exemption, or else bear the consequences.⁵

¹ *Robinson v. Dunmore*, per Chambre, J., 2 B. & P. 416, 419. Cf. *Clark v. Burns*, 118 Mass. 275.

² *Talley v. Great Western R.*, L. R. 6 C. P. 44. And see *Bergheim v. Great Eastern R.*, 3 C. P. D. 221; *Bunch v. Great Western R.*, 17 Q. B. D. 215.

³ *Willes, J.*, in *Talley v. Great Western R.*, *supra*.

⁴ In *Whitney v. Pullman Car Co.* (Mass.), 9 N. E. 619, the plaintiff absented herself from the car at a way-station for several minutes, leaving her satchel of valuables silently on the window-sill, from which place it was stolen.

⁵ See *Cockburn, C. J.*, in *Le Conteur v. London & South-Western R.*,

§ 684. **The same Subject.** — Where, however, baggage is retained in the passenger's secret and exclusive custody, of which no notice whatever is brought to the carrier, and no assent to the transportation can be presumed, the carrier ought not, as it seems, to be holden responsible at all; and more especially if the place of actual deposit selected be unusual, unfit, and such as invites danger. The utter want of a delivery, and of acceptance, actual or constructive, on the carrier's part, might well be alleged here to negative the idea that a bailment was created; though the act of the owner would almost invariably, under such circumstances, excuse the carrier, should loss occur, even upon the theory of a bailment undertaking;¹ while, bailment or no bailment, the carrier ought to respond if it were shown that the loss was by his wrong.

A passenger in a sleeping-car left his hand-bag while he went to dinner. He did not leave it there carelessly or silently, but spoke to an employé, who informed him that it would be safe. While he was gone the car was locked and detached. Upon his return he was directed to take his seat in another sleeping-car where he would find his baggage. But only part of his baggage was found there, and he sued the railroad company for its loss. It was held that the jury were warranted in finding that his missing bag was lost through the company's negligence; and that no private arrangement between the company and the proprietor of the

L. R. 1 Q. B. 54; *Butcher v. London R.*, 16 C. B. 13; *Richards v. London R.*, 7 C. B. 839.

As to the conflict of authority regarding a carrier's liability for baggage which a passenger by water keeps in his state-room, see *supra*, § 680. On the same reasoning as above, it seems illogical to assert that the permitted carriage of baggage in the passenger's state-room is no bailment of baggage to the carrier.

¹ See *Gleason v. Goodrich Trans. Co.*, 32 Wis. 85. And cf., as to a passenger's watch or jewelry on his person, *Clark v. Burns*, 118 Mass. 275; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Abbott v. Bradstreet*, 55 Me. 530.

first sleeping-car could obstruct his remedy.¹ In other instances a sleeping-car company, though no common carrier, strictly speaking, has been held liable for thefts occurring through the failure of the car company to keep a proper watch on the premises by night.²

§ 685. **Carrier's Rules as to Hand-Baggage, etc.** — While a common carrier may require that trunks and packages delivered him as baggage be properly fastened and secured, he cannot enforce such unreasonable rules in this respect as to transfer to an unwilling passenger his own burdensome risks. Thus, the regulation of a railway company, to the effect that small articles, like coats, umbrellas, and sticks must either be kept by the passenger in his personal custody, and at his personal risk, or else be specially paid for as freight, is in derogation of the legal right of passengers to have their reasonable baggage transported without special charge; and, if such things be wrapped up strongly and properly marked, though it be only in a shawl fastened with a strap, the company is bound to accept and carry them as baggage.³

§ 686. **Liability for Articles, not Baggage, taken by the Passenger.** — Once more, where a passenger takes with him things which are outside the privilege and legal protection of bag-

¹ *Kinsley v. Lake Shore R.*, 125 Mass. 54. And see (Tenn.) 1 S. W. 44.

² *Woodruff Co. v. Diehl*, 84 Ind. 474; *Lewis v. Sleeping-Car Co.* (Mass.), 9 N. E. 615. In such a case the loss occurs where the custody is mixed, through the defendant's want of ordinary care. If not liable as common carrier, he is at all events a bailee for reward and answerable accordingly. To hold a sleeping-car company thus liable, negligence must be accordingly proved, and not simply a loss. *Tracy v. Pullman Car Co.*, 67 How. (N. Y.) Pr. 154.

We may add that under the general law of torts, and aside from any breach of contract or strict bailment, one renders himself liable for causing loss or injury to another who is not in default, by his own negligence or misconduct.

³ *Munster v. South-Eastern R.*, 4 C. B. N. s. 676. This supposes that the passenger does not transcend recognized rules which limit the weight, dimensions, and value of baggage for every passenger.

gage, the manner and circumstances of taking, caring for, and transporting bear considerably on the issue of carriage responsibility. 1. Things of this kind concealed about one's person, as, for instance, valuable securities or a large sum of money, are taken by the passenger, if not with actual intent to impose falsely on the carrier, at all events with insufficient confidence in him to create a bailment obligation. The absence of an offer for bailment, and of all manner of notice that this property was in transit, must have prevented the passenger-carrier from exacting on his behalf the special compensation to which he would be legally entitled as a carrier of freight, and from making such reasonable provision against the dangers of the journey as the increased hazards on his part demanded.¹ There is no inconsistency in saying

¹ First Nat. Bank *v.* Marietta R., 20 Ohio St. 259; Haines *v.* Chicago R., 29 Minn. 160; 20 Fed. R. 430.

Weeks v. New York R., 72 N. Y. 50 (1878), is a singular case. The plaintiff was a passenger on the defendants' cars. The car was detached for a moment, near the terminus, waiting to be finally carried into the depot. While it was thus standing some persons entered the car, forcibly assaulted the plaintiff, and stole from his person bonds of the value of \$16,000. He sued to recover the property. On the present appeal the plaintiff's right to recover was put upon the ground that the carrier ought to have protected the person of his passenger from violence; but this, the court held, was untenable. Nor could the plaintiff recover, as the court also decided, on the supposition that his purchase of a passenger ticket obliged the railway to carry safely this valuable property, of whose existence its servants had no knowledge. "If the claim of the plaintiff is to be sustained," observes Folger, J., "it must be held that, from the circumstances of the case, the defendant owed such duty to the plaintiff as that it was an insurer of the safe carriage of his securities, in the mode of carriage adopted by him, and for no greater consideration than the usual price paid by any passenger on its cars, and without knowledge or notice that he had them upon his person."

It should be noted that the passenger, in this case, had not contributed by his negligence to the loss; this was admitted in the decisions, and, in fact, the verdict in the court below (afterwards set aside, and on that issue appealed) was for the plaintiff. Stress was here laid by the court (1) upon the value of the package, so excessive and so alien to the

that, under such circumstances, no bailment undertaking has been assumed by the passenger-carrier, and that whatever liability may exist at all depends upon the general law of torts.

2. But of articles not legally one's baggage, which are given in fact into the passenger-carrier's custody, having the appearance of baggage, and as though they were such, — as, for instance, one's merchandise and valuables, samples, or a friend's property in a trunk, — we cannot so clearly pronounce that, in theory and actual fact, there is no bailment to the carrier at all. There surely seems to be delivery and acceptance, though it were of a closed receptacle with its contents, or of that which outwardly appeared to be something else. And yet, granting that such a bailment took place, and that the passenger-carrier is by occupation a common carrier likewise, the carrier is here without due opportunity of charging freight upon it, and devoting especial care to its safety, because of the knowledge withheld from him; and hence his responsibility should be rated no higher than that of a bailee without reward, whose acceptance was according to false appearances. And, since a passenger may most innocently and naturally have packed into his trunk things serviceable only with reference to his place of destination, saying and doing nothing to

character of ordinary baggage as to render it very doubtful whether the passenger-carrier could have been compelled to take charge of it under any circumstances; (2) upon the absence of notice of such property to the carrier.

But had the passenger been thus forcibly deprived of his overcoat, his cane, umbrella, or possibly his wallet with needful travelling money, in short, of what we may call "hand-baggage," we much question whether a decision like this would have been right. For it might have been contended that towards articles so constantly and needfully carried by a passenger about him, and exposed, most likely, to the sight of the carrier's servants, who made no objection thereto, the carrier had assumed the duty of a gratuitous bailee, if no more, so as to be chargeable in any case, for gross negligence which occasioned their loss. See *Jordan v. Fall River R.*, 5 Cush. 69. Indeed, we should say that towards such "hand-baggage" the carrier incurs the full risk of common carrier, modified, however, by the fact of a mixed custody, as where a drover travels with cattle.

put the carrier off his guard, and relying upon an acceptance thereof without question or proviso, we may conclude it not an irrational presumption that, for such contents of his passenger's closed receptacle as may prove to be literally "baggage," the bailee assumes to be a common carrier, and, as for the rest, a gratuitous carrier.¹ For if a trunk, checked and accepted by a railway company, is with such gross carelessness placed on a pile in an open baggage car, and left unwatched, that it drops out while the train is in full motion, shall it be said that the company can set up, in total or partial exoneration from liability, that the trunk contains bed-clothes instead of shirts, or money amounting not to ten dollars, but a thousand? Our presumption, then, best comports with the public welfare; and, even thus, the owner's negligent or wilful acts contributing to the injury are clearly available to the carrier in defence, though the latter party be pronounced a bailee.

Yet the carrier might be fully informed of the contents of such a trunk, and expressly assume towards it by his acts the character of ordinary or exceptional bailee according to the circumstances.²

§ 687. **The same Subject.** — 3. Yet, in some decisions, the rule appears to be laid down differently; and so as to favor rather the presumption that any trunk or package accepted by the passenger-carrier from the passenger is so exclusively accepted for baggage only, that, if it should prove to contain other articles, the carrier, who took it according to appearances, shall not, as to these articles, be regarded a bailee at all. The carrier has thus been excused where the package contained merchandise only, and was deceitfully done

¹ See the limitations laid down by the court in *Jordan v. Fall River R.*, 5 Cush. 69; *Michigan Central R. v. Carrow*, 73 Ill. 348; *Ross v. Missouri R.*, 4 Mo. App. 582; *Flint R. v. Weir*, 37 Mich. 111.

² As in *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; *Strouss v. Wabash R.*, 17 Fed. R. 209.

up or marked;¹ where large sums of money and valuable securities (which it is by no means certain that a railway or steamboat is bound to carry at all), belonging to some third party, were smuggled into the carrier's keeping;² and more particularly when the passenger must have known that he transgressed the carrier's rules, and sought to put an undue risk upon him in making such bailment.³ Though the intimation in such cases is frequently that there was no contract, — no bailment undertaking at all, — on the passenger-carrier's part, the better reason seems to indicate that a bailment undertaking was assumed, as above, from whose disastrous consequences the imputation to the passenger of bad faith or carelessness, and his failure to give an opportunity of charging and caring for the articles as freight, and the general maxim, moreover, that a common carrier may carry things according to appearances, practically absolve the carrier.

4. But, where articles not baggage are openly confided as such by the passenger, or so consigned to the carrier's keeping that he must needs have perceived their true character, the better disposition is to charge the carrier, who makes no objection to receiving them, as on a bailment undertaking for their conveyance. For here the presumption is justifiable that the carrier consented to become at least a gratuitous bailee; and the courts have gone even farther, and asserted that such an acceptance by a railway would be that of a common carrier, inasmuch as the carrier is left at perfect liberty to charge special freight.⁴

¹ *Cahill v. London R.*, 10 C. B. N. S. 154.

² *Dunlap v. International Steamboat Co.*, 98 Mass. 371. And see *Sewall v. Allen*, 6 Wend. 335; *supra*, §§ 423, 674.

³ *Belfast R. v. Keys*, 9 H. L. 556; *Smith v. Boston & Maine R.*, 44 N. H. 325. In *Alling v. Boston & Albany R.*, 126 Mass. 121, the rule is very strenuously asserted in the carrier's favor. Here a "sample trunk" was taken by a travelling salesman; and the loss appears to have occurred through an artful shifting of baggage-checks procured by a stranger.

⁴ *Great Northern R. v. Shepherd*, 8 Ex. 30; *Butler v. Hudson River R.*, 3 E. D. Smith, 571; *Minter v. Pacific R.*, 41 Mo. 503. And see

§ 688. **Carrier may charge Freight for what is not Baggage.** — Under any circumstances, a carrier is entitled to charge freight for that which he receives as baggage, and afterwards discovers is not entitled to carriage under that privilege.¹

§ 689. **Special Contract Terms affecting Liability for Baggage.** — Special contract terms modifying his liability for baggage may be imposed by the carrier, subject to the conditions elsewhere discussed; namely, that such terms (1) shall be consonant with public policy and (2) seasonably brought to the passenger's knowledge.²

In England, a passenger-carrier by water has been granted immunity from liability for the loss of baggage through the captain's negligence, where the plaintiff's passage-ticket contained a condition that the vessel-owners would not consider themselves accountable for such property unless a bill of lading was signed therefor; and the evidence showing that no such bill was either offered or demanded.³ Railway carriers, too, have been allowed to exclude by general notice all liability whatsoever for baggage taken on cheap excursion trains; and this, notwithstanding the purchaser of a ticket knows nothing of the condition, nor is allowed to keep his trunk under his own control.⁴

But if either the land or water carrier of passengers pro-

Glasco v. New York R., 36 Barb. 557; *Sloman v. Great Western R.*, 67 N. Y. 208.

¹ *Rumsey v. North-Eastern R.*, 14 C. B. N. S. 641.

² *Supra*, Part VI. c. 5.

Tickets which are used for passenger travel are generally hurriedly bought by those who must hurriedly get their baggage taken in charge, and find their places. The passenger's main concern is that the document shall take him to a certain destination; and neither such tickets nor baggage checks or tokens, if inscribed with special restrictions for baggage liability, would readily attract a traveller's attention before he has actually bailed his baggage and started on the journey.

³ *Wilton v. Atlantic Steam Nav. Co.*, 10 C. B. N. S. 453.

⁴ *Stewart v. London R.*, 3 II. & C. 135; *Rumsey v. North-Eastern R.*, 11 C. B. N. S. 641. But see § 691.

poses special conditions as to accepting baggage, he must afford to the owner a due opportunity of complying with them, so far as action on his part may be needful.¹ And it seems not unworthy of suggestion that any interchange of checks or identification of baggage will take place more fitly upon a steamboat than a railway train, after the transit has actually begun.

§ 690. **The same Subject.**— In this country, where common carriers are not permitted by mere legal construction to divest themselves so completely of bailment responsibility as in England, and where, too, legislation less influences the course of precedents,² the cases stop short of such conclusions. They refuse to permit the baggage risk to be shifted wholly upon the traveller who has yielded up the control of his effects ;³ they discountenance imposing carriage conditions by general notice ;⁴ they even decline to pronounce stipulations, written, stamped, or printed upon the passenger's ticket or baggage token available for the carrier's protection equally with those contained in an ocean bill of lading.⁵ Limitations printed on the back of a ticket or in almost illegible type are

¹ *Great Western R. v. Goodman*, 12 C. B. 312. Here a railway company disclaimed all responsibility for the care of baggage unless booked and paid for, but failed to show that means for booking were provided.

In *Harrison v. Great Western R.*, 1 Q. B. D. 515, a passenger was charged with notice of conditions concerning baggage which were on the back of his ticket. But see *contra*, *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470.

² See *supra*, Part VI. c. 5.

³ *Camden & Amboy R. v. Baldauf*, 16 Penn. St. 67.

⁴ *Malone v. Boston & Worcester R.*, 12 Gray, 388; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; *Camden & Amboy R. v. Baldauf*, 16 Penn. St. 67; *Davidson v. Graham*, 2 Ohio St. 131; *Jones v. Voorhees*, 10 Ohio, 145.

⁵ *Hopkins v. Westcott*, 6 Blatchf. 64; *Blossom v. Dodd*, 43 N. Y. 264. The liability of a railroad company for loss of a passenger's baggage is not limited by a notice printed on the face of his ticket, unless his attention is seasonably called to the notice, or unless circumstances are such as to make it negligence not to read it. 23 Fed. R. 765.

of very doubtful efficacy.¹ Conditions as to baggage consistent with the relation of a private carrier may, doubtless, be established upon the passenger's knowledge and assent; and the latter party will be assumed to have consented to such modifying terms as he is made aware of in good season, and does not then refuse to be bound to; but baggage conditions which are not brought home to him until his journey has actually commenced — as if a railway passenger, not previously notified, should first read the limiting notice of baggage liability, printed on his ticket, after his train has started — will not be held binding upon him.² Nor do special stipulations which are brought to a traveller's notice by night in a dimly lighted car find favor.³

The special conditions most favored by passenger-carriers as to baggage are such as tend to restrict the weight and value thereof, and limit the baggage responsibility accordingly.⁴

§ 691. **Legislation affecting Liability for Baggage.** — Legislation may likewise affect the conditions of baggage liability. Thus, the baggage of passengers travelling by the modes of conveyance specified by Parliament, must now, according to the latest English decisions, conform to the Railway and Canal Traffic Act; and hence no such condition will be upheld

¹ *Supra*, Part VI. c. 5.

² *Rawson v. Penn. R.*, 48 N. Y. 212; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225; 16 N. Y. Supr. 322.

³ *Lewis v. Sleeping Car Co. (Mass.)*, 9 N. E. 615. In *Madan v. Sherard*, 73 N. Y. 329, the rule is applied in the case of a passenger whose check is taken by a baggage transfer express. And see *Verner v. Sweitzer*, 32 Penn. St. 208.

⁴ See *Rawson v. Penn. R.*, 48 N. Y. 212. Such a special stipulation as concerns a steamship passenger (though the stipulation was not unfair) is favored to an extreme in *Steers v. Liverpool Steamship Co.*, 57 N. Y. 1. And the presumption of assent is put more strongly here than would be warranted in the case of railway transportation of passengers and baggage. *Ib.* A limitation of baggage per passenger to one trunk or to \$100 in value, or a defined reasonable weight, would seem justifiable. See (Cal.) 11 Pac. R. 686.

that is not "just and reasonable," nor unless the passenger sanctions it by his signature.¹

§ 692. **When Liability for Baggage terminates, etc.** — The liability of a railway or other carrier for the baggage of a passenger lasts, in general, until the passenger has had a reasonable opportunity to receive and take charge of it, after it has reached its destination;² but it terminates upon re-delivery of the property to the passenger or his substitute in suitable condition.³ Where baggage is unclaimed within a reasonable time, the carrier should store it in a proper and secure place until called for, or otherwise legally disposed of;⁴ but thus assuming the duties of a warehouseman, with or without compensation, towards it, the bailee is not justified in placing property of such consequence where it might easily be plundered or spoiled.⁵ And thus is it, too, with property not strictly baggage, towards which the carrier assumes the warehouseman's relation.⁶ What is a reasonable time within

¹ Act 17 & 18 Vict. c. 31, § 7; Act 31 & 32 Vict. c. 119, § 10; *Cohen v. South-Eastern R.*, 1 Ex. D. 217. But see *Stewart v. London & North-Western R.*, 3 H. & C. 135, which laid the law down differently in the case of a cheap excursion train. See also *Rumsey v. North-Eastern R.*, 14 C. B. x. s. 641. And see *supra*, Part VI. c. 5.

U. S. Rev. Sts. § 4281, exempting from liability for loss of articles of whose value the "shipper" does not notify, does not apply to carriers by land for the baggage of passengers. *N. Y. Central R. v. Fraloff*, 100 U. S. 24.

² *Patscheider v. Great Western R.*, 3 Ex. D. 153; *Powell v. Myers*, 26 Wend. 591; *Onimit v. Henshaw*, 35 Vt. 605; *Roth v. Buffalo R.*, 34 N. Y. 548; *Mote v. Chicago, &c. R.*, 27 Iowa, 22; *Angell Carriers*, §§ 114, 320; *Chicago, &c. R. v. Boyce*, 73 Ill. 510; *Louisville, &c. R. v. Mahan*, 8 Bush, 184; 4 Mo. App. 582.

³ *Hodkinson v. London R.*, 14 Q. B. D. 228.

For a case where a hack carried a passenger and his trunk, and the facts showed that the passenger waived a delivery at the house by permitting the trunk to be left on the sidewalk, where it was stolen, see *Patten v. Johnson*, 131 Mass. 297.

⁴ See note 2.

⁵ *Mote v. Chicago, &c. R.*, 27 Iowa, 22; *Bartholomew v. St. Louis, &c. R.*, 53 Ill. 227.

⁶ *Pennsylvania Co. v. Miller*, 35 Ohio St. 541; *Strouss v. Wabash R.*, 17 Fed. R. 209.

which a passenger should claim baggage is not clearly stated; nor, as to railways which unload trunks with despatch, will the risk of insurer be so readily prolonged by inference as in the case of ocean steamships;¹ but circumstances, such as the day or hour when the passenger and his baggage arrive, and the facilities afforded at the depot for removing the articles promptly, may control the issue.² A passenger cannot protract the carrier's liability as insurer for his baggage by breaking his own journey, and stopping over, even though this be caused by unexpected illness or injury.³

But if the carrier was to blame, for preventing the passenger from reaching his journey's end as soon as his baggage, his risk is extended. And where baggage, through the carrier's own fault, gets carried past or short of its destination, and is stored at the wrong station, the extraordinary liability of common carrier is not discharged.⁴ Furthermore a railway or other carrier may, by employing porters at the place of destination, extend the strict liability for the safety of a passenger's baggage until it has been safely carried from the transporting vehicle elsewhere.⁵ The liability incurred for

¹ See *Roth v. Buffalo R.*, 34 N. Y. 548; *Van Horn v. Kermit*, 4 E. D. Smith, 453; *Nevins v. Bay State Steamboat Co.*, 4 Bosw. 225.

² As to the duty of promptly removing one's baggage which arrives at night, cf. *Roth v. Buffalo R.*, 34 N. Y. 548, and *Carey v. Cleveland R.*, 29 Barb. 35. And see *Ouimit v. Henshaw*, 35 Vt. 605; *Louisville, &c. R. v. Mahan*, 8 Bush, 184. *Jones v. Norwich Transp. Co.*, 50 Barb. 193, is a case where the arrival was on Sunday. The inclination of the latest cases is to require baggage which arrives by railway by night or on Sunday to be promptly taken away, since otherwise the passenger can hold the company only as warehouseman.

³ *Chicago, &c. R. v. Boyce*, 73 Ill. 510.

⁴ *Toledo, &c. R. v. Hammond*, 33 Ind. 379; *Wilson v. Grand Trunk R.*, 57 Me. 138. And see (*Tex.*) 1 S. W. 624.

⁵ *Richards v. London R.*, 7 C. B. 839; *Midland R. v. Bromley*, 17 C. B. 372; *Kent v. Midland R.*, L. R. 10 Q. B. 1; *Fisher v. Geddes*, 15 La. Ann. 14. Cf. *Hodkinson v. London R.*, 14 Q. B. D. 228, where the carrier in effect delivered to the passenger, who in turn delivered to a porter, under whose charge a loss occurred. As to loss through the negligence of a public porter, see 80 Mo. 185.

things deposited or left with the carrier at the end of the transit by a passenger who might have removed them is that of a bailee with or without recompense, according to the circumstances, and is subject to the usual modifications by special contract.¹

§ 693. **Carrier's Right of Lien as to Baggage.**—The carrier's right of lien extends, of course, to baggage transported by a passenger, so as to make it secure payment of his unpaid passage-money; though to detain in this manner the passenger, or the clothes he has on his person, would be unlawful.²

§ 694. **Burden of Proof where Baggage is lost or injured.**—Consistently with the general rules already laid down as to the burden of proof in case of loss or injury, we may say that where the passenger produces a check, way-bill, receipt, or other token from the carrier, and the corresponding baggage cannot be produced at its destination, this will render the passenger-carrier *prima facie* liable in his public capacity;³ and the burden of showing a previous delivery, or otherwise accounting for its disappearance, rests upon the carrier, even (as it is held) if the passenger fail, within a reasonable time after his baggage is due, to claim it.⁴ But for hand-baggage or property not exclusively committed to the carrier nor acknowledged by any token the burden of proving negligence in the bailee is necessarily greater.

¹ See *Van Toll v. South-Eastern R.*, 12 C. B. N. S. 75; *Harris v. Great Western R.*, 1 Q. B. D. 515; *Parker v. South-Eastern R.*, 1 C. P. D. 618; *Van Gilder v. Chicago R.*, 44 Iowa, 548; *National Line S. S. Co. v. Smart*, 107 Penn. St. 492.

² *Wolf v. Summers*, 2 Camp. 631; *Sunbolf v. Alford*, 3 M. & W. 248. And see, as to the obligation to refund passage money, *Cope v. Dodd*, 13 Penn. St. 33; *Brown v. Harris*, 2 Gray, 359.

³ *Fairfax v. N. Y. Central R.*, 67 N. Y. 11; *Burnell v. N. Y. Central R.*, 45 N. Y. 184; *Atchison R. v. Brewer*, 20 Kan. 669. The possession of such check or token indicates *prima facie* a sufficient bailment to the carrier.

⁴ Cases *supra*; *Matteson v. N. Y. Central R.*, 76 N. Y. 381. This is on the ground that even where the common carrier ceases to be liable as such, he continues responsible as warehouseman. See *supra*, § 23.

Where the baggage, when re-delivered, bears marks of injury such as could not probably have occurred save while in the carrier's own custody, the passenger-carrier is *prima facie* chargeable. But if, through mixed custody, a re-delivery, or otherwise, the injury complained of might have occurred while the baggage was out of the carrier's custody, the passenger must repel any such imputation in order to make the carrier answerable.¹

§ 695. **Practice in Suits for Lost Baggage.**—The passenger is generally the proper person to sue for the loss of his baggage.² But where several travel together as passengers, and all their baggage is contained in a trunk belonging to one of them, who keeps the key and acts as the special bailee of his companions, he is permitted to sue the carrier in his own name, if the trunk and contents be lost;³ though manifestly he could not thus exclude their several rights of action, if they chose to assert them seasonably, and recover each for himself, or, as the evidence might better establish under such circumstances, sue all together as joint bailors, and avoid subjecting the carrier to a multiplicity of actions.⁴

¹ *Supra*, § 578.

Where a former recovery was limited to the loss of baggage, although the plaintiff sought to include merchandise carried by him at the same time, for which extra compensation was paid, it was held that a second action lay to recover for the merchandise. *Millar v. Missouri R.*, 86 N. Y. 441.

² *Supra*, Part VI. c. 8

³ *Moran v. Portland Steam Packet Co.*, 35 Me. 55. It appeared in this case, though the circumstance was not relied upon, that the other owners released in this plaintiff's favor.

⁴ *Metcalf v. London R.*, 4 C. B. N. S. 307. One cannot, however, by simply getting a trunk accepted by a railway passenger-carrier as baggage, when he travels, confer upon another party not a passenger by the same train, any right, in case of loss, to sue as owner for the trunk or for any portion of its contents: not even though such traveller be the servant of the real owner, who travels without baggage by a later train. For here the baggage is presumably accepted as that of the passenger alone who journeys with it, and he must bring suit; nor, in general, does a

The standard of market value does not afford a just criterion where wearing-apparel is lost. And a passenger who recovers for lost baggage may fairly claim to be reimbursed according to their just valuation for his own use; which appears in reasonable accord with the understanding upon which baggage is transported.¹ But in fundamental principle damages are not awarded differently for inexcusable loss of baggage than for inexcusable loss of goods taken for freight.²

§ 696. **Connecting Carriers as to Baggage.**—The rules elsewhere considered which apply to connecting lines for goods received in freight apply also to the carriage of baggage beyond the receiving carrier's terminus; though here the undertaking must be studied with more direct reference to the contract for transporting the passenger.³ In general, when a passenger's full fare is received at a terminus or way station, and a through ticket announcing no reservation of risks is given him, together with a through check for his baggage, the presumable undertaking of the railway or other carrier is to transport the baggage to the point of destination, notwithstanding the line be made up of different connecting carriers.⁴ Thus, the English rule, that a carriage contract is implied for the entire route, operates upon whatever baggage such carrier has booked through, although it be

passenger-carrier undertake common-carriage risks of baggage, except for that which accompanies the passenger as rightfully his own baggage. See *supra*, § 672; *Becher v. Great Eastern R.*, L. R. 5 Q. B. 241.

¹ *Fairfax v. N. Y. Central R.*, 73 N. Y. 167.

² See *supra*, §§ 572, 573; *Mote v. Chicago R.*, 27 Iowa, 22; *Brock v. Gale*, 14 Fla. 523.

³ *Mytton v. Midland R.*, 4 H. & N. 615; *Hart v. Rensselaer, &c. R.*, 4 Seld. 37; *Najac v. Boston & Lowell R.*, 7 Allen, 329; *supra*, c. 1.

⁴ See *Carter v. Peck*, 4 Sneed, 203; *Illinois Central R. v. Copeland*, 24 Ill. 332; *Candee v. Pennsylvania R.*, 21 Wis. 582; *Lock Co. v. Railroad*, 48 N. H. 339, 354; 9 Lea, 38. As to the effect of selling a through ticket for the passenger's fare without checking the baggage through, see *Candee v. Pennsylvania R.*, *supra*.

beyond his own route.¹ In this country, too, it has been held, and not unreasonably, that where a railway sells through tickets, receiving the full fare, and issues through baggage checks, for some distant point, the undertaking implied is to carry the baggage through, notwithstanding any intermediate change of cars.² This is but a fair convenience afforded the travelling public, who may well repose on the assumption that the connecting roads which recognize such tickets and checks have mutually pre-arranged the adjustment of losses and the mutual consequences of miscarriage. Limitations of liability, such as may overcome such a presumption, ought to be brought to the passenger's knowledge.³

The passenger left thus free to sue the first carrier for loss of his baggage, may sue instead the connecting carrier (as our American courts have sometimes held), provided he establish, in proof, that the latter is privy to the carriage arrangement, and that the baggage actually reached such carrier's custody.⁴ But this doctrine is not so clearly sanctioned in Great Britain,⁵ and it admits of qualification.⁶ Some States for convenience permit the passenger whose baggage is missing to hold the last carrier presumably liable;⁷ while others refuse that privilege, unless the passenger can

¹ 2 Redfield Railways, § 162; *Bristol & Exeter R. v. Collins*, 7 H. L. 191.

² *Illinois Central R. v. Copeland*, 24 Ill. 332; *Hart v. Rensselaer, &c. R.*, 4 Seld. 37; *Najac v. Boston & Lowell R.*, 7 Allen, 329; *Railroad Co. v. Campbell*, 36 Ohio St. 647.

³ *Supra*, Part VI. c. 9; *Railroad Co. v. Campbell*, 36 Ohio St. 647.

⁴ *Hart v. Rensselaer R.*, 4 Seld. 37; *Chicago R. v. Fahey*, 52 Ill. 81.

⁵ See *supra*, §§ 595, 596; *Bristol & Exeter R. v. Collins*, 7 H. L. 191. The English practice of "booking through" is peculiar, and the cases are not all easily reconciled. But in *Hooper v. London R.*, 29 W. R. 241, the carrier on whose line the loss occurred was adjudged liable for the baggage. And see 5 C. P. D. 157.

⁶ The leading principles to be here kept in view may be studied under Part VI. c. 9. And see, as to connecting carriers of passengers, *supra*, c. 1.

⁷ *Savannah R. v. McIntosh*, 73 Ga. 532; *supra*, c. 1; 10 Mo. App. 125.

either establish that such carrier actually lost it or that there was such community of interest as to make this carrier partner in effect with the negligent carrier.¹

Where one buys a ticket over connecting roads, and his baggage is checked to go by the same route, it is wrongful for any intermediate railroad agent to put the baggage, without the owner's permission, or some supervening necessity, on a different route. But the new company which, under these circumstances, accepts the trust of taking the property through, becomes liable for the safety of the baggage, if not as a common carrier, at all events like a hired bailee, and, as good reason would assert in a strong case, clothed with those extraordinary bailment risks which the law places upon the wrongful intermeddler.²

§ 697. **Conclusion as to Modern Law of Bailments.** — In bringing to a close this Treatise on the Law of Bailments, we may, perhaps, be permitted to express the hope that, if the statement of legal principles leaves in many places, especially under the head of Carriers, the impression of inexactness, as though rules are honeycombed by exceptions, and one legal doctrine absorbs another, the careful reader who compares the text with the citations will conclude this to indicate, not so much a confusion of thought in the writer himself, as actual uncertainty among the courts thus reported; whose judges, in the effort to deal equally with suitors and extend familiar rules to the complex and multiform transactions of modern life, are already finding it hopeless to compress the close relations of society and business into legal maxims.

¹ 21 S. C. 35; *Atchison R. v. Roach*, 35 Kan. 740.

² *Fairfax v. N. Y. Central R.*, 67 N. Y. 11; s. c. 73 N. Y. 167.

ADDENDA.

THE following, among the very latest cases reported, are here added to illustrate the general principles discussed in the foregoing treatise : —

- § 7. See 63 Wis. 331 ; 111 Penn. St. 589.
- §§ 40, 41. Gross negligence in a gratuitous deposit. See 141 Mass. 492, 531.
- § 54. See 73 Ga. 472.
- §§ 59, 60. Naked bailee not liable for delivering to wrong person, where agent of the right person helps induce the loss. *Brant v. McMahon*, 56 Mich. 498.
- §§ 134, 155. See 102 Ind. 146.
- §§ 150, 151, 160. 39 Hun. 617 ; 104 Ind. 459.
- §§ 164, 167-169. Transaction where a lease is pledged with a right in the lessee to cut wood. Not a conditional sale. The word "guaranty" used in sense of security or lien. *Wilkie v. Day*, 141 Mass. 68. Instance of the pledge of a mortgage. 66 Cal. 480.
- §§ 178, 264. *Liggett Co.'s Appeal*. 111 Penn. St. 291.
- §§ 190, 194, 195. See 67 Iowa, 526 ; 108 Penn. St. 258.
- §§ 206-208, 236-238. See *City Savings Bank v. Hopson*, 53 Conn. 453.
- §§ 220, 221. *Gunsel v. McDonnell*, 67 Iowa, 526.
- § 235. No collusive or oppressive enforcement of a pledge security to the detriment of the pledgor is permitted. 66 Cal. 480.
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